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# Lawyers' Negligence Liability to Non-Clients: A Texas Viewpoint.

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# COMMENT

## Lawyers' Negligence Liability To Non-Clients: A Texas Viewpoint

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### I. INTRODUCTION

In a majority of jurisdictions in the United States, attorneys enjoy the benefits of the privity of contract limitation on the scope of their duty to exercise reasonable care.[1] As a result, lawyers have long been immune to negligent malpractice actions brought by non-clients.[2] Providers of products and services once enjoyed the total defense of lack of privity to negli-

1. Only a few state courts of last resort have held that attorneys may be liable to non-clients for negligence. *See* Lucas v. Hamm, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961), *cert. denied*, 368 U.S. 987 (1962); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981); Succession of Killingsworth, 292 So. 2d 536, 542 (La. 1973).

2. *See, e.g.*, Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879) (setting forth general rule requiring privity); McDonald v. Stewart, 182 N.W.2d 437, 440 (Minn. 1970) (attorneys immune from third party suits in absence of fraud); Bryan & Amidei v. Law, 435 S.W.2d 587, 593 (Tex. Civ. App.—Fort Worth 1968, no writ) (duty of attorney owed only to client).

gence actions brought by third persons not in a contractual relationship with the provider.[3] Many exceptions to this general rule have developed;[4] and although the area of legal malpractice has been a particularly strong bastion for the privity requirement,[5] there are an increasing number of cases in which a duty of due care has been imposed on a negligent lawyer to a non-client.[6]

A major purpose of this comment is to examine various classes of relationships between a lawyer and a non-client plaintiff to determine whether the privity requirement should be abandoned in some situations.[7] Though lawyer malpractice cases are the primary source of information, the liability of members of other professions is also analyzed, in situations where obvious parallels exist, to provide greater objectivity in determining when the scope of liability of the legal profession should extend beyond privity of contract.[8] A second purpose is to define what the new limitation on the scope of duty should be in those situations where the privity limitation is too stringent.

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3. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 403 (Ex. 1842).

4. *See, e.g.*, Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922) (established exception in negligent misrepresentation case); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (established exception to privity requirement in products liability); Thomas v. Winchester, 57 Am. Dec. 455, 458-59 (N.Y. 1852) (established exception where extremely dangerous product involved).

5. *See, e.g.*, Graham v. Turcotte, 628 S.W.2d 182, 184 (Tex. Ct. App.—Corpus Christi 1982, no writ) (no privity or special relationship shown and no liability imposed); Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (attorney not liable for negligent misrepresentation to third parties); Bryan & Amidei v. Law, 435 S.W.2d 587, 593 (Tex. Civ. App.—Fort Worth 1968, no writ) (attorney's duty not owed to third parties).

6. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (attorney liable to third party for negligence); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Ct. App. 1976) (attorney liable to third party for negligent misrepresentation); McAbee v. Edwards, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (attorney liable to intended beneficiaries for negligent will preparation).

7. The relationship between a lawyer and a non-client can range from one of adverse interests to one of common interests. *Compare* Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (plaintiff previously in litigation against attorney) *with* Succession of Killingsworth, 292 So. 2d 536, 538 n.1 (La. 1973) (plaintiffs beneficiaries of will drafted by attorney).

8. Great similarities are often found in negligent misrepresentation cases involving other professions. *See, e.g.*, North Am. Co. for Life & Health Ins. v. Berger, 648 F.2d 305, 308 (5th Cir.) (doctors may be liable to third party), *cert. denied*, ___ U.S. ___, 102 S. Ct. 641, 70 L. Ed. 2d 619 (1981); Howell v. Fisher, 272 S.E.2d 19, 26 (N.C. Ct. App. 1980) (engineers may be liable to third party); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants owed duty to third party).

## II. Historical Background of Privity

### A. *In General*

The privity requirement was firmly established by the English courts in 1842 in *Winterbottom v. Wright*.[9] A mailman was seriously injured when the coach in which he was riding collapsed on the road.[10] The manufacturer of the coach was not held liable to the mailman because the mailman's employer, rather than the mailman himself, had purchased the defective coach from the manufacturer.[11] The rule was set forth plainly that where *A* sells a negligently made product to *B*, and *C* is injured by the product, *A* is not liable to *C*, but only to *B*, the party to the contract.[12] The court's reasoning in support of this limited scope of duty was to prevent a single defendant's liability to countless possible plaintiffs.[13] The English court stated that "if we go one step beyond that, there is no reason why we should not go fifty."[14] Only ten years later in 1852, the American decision of *Thomas v. Winchester*[15] created an exception to the rule where the product involved was extremely dangerous.[16] In the New York case of *MacPherson v. Buick Motor Co.*,[17] Justice Cardozo relied on this exception for dangerous products in imposing liability on a car manufacturer to a user who had not bought directly from the manufacturer,[18] thus creating a now universally recognized exception to the privity requirement in the area of product liability.[19]

In *Glanzer v. Shepard*,[20] Justice Cardozo again abandoned the privity limitation in a case much more relevant to the legal and accounting professions.[21] In this case a certified public weigher was hired by a seller to

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9. 152 Eng. Rep. 402 (Ex. 1842).

10. *Id.* at 403.

11. *Id.* at 404-05.

12. *Id.* at 402-03.

13. *See id.* at 404 (allowing plaintiff to recover would allow "an infinity of actions").

14. *Id.* at 405.

15. 57 Am. Dec. 455 (N.Y. 1852).

16. *See id.* at 458-59. The product in *Thomas* was a bottle of deadly poison mislabeled as a harmless medicine. *See id.* at 455. The court cited *Winterbottom* but distinguished the two cases because the mishap involved in *Thomas* would almost inevitably lead to death or serious injury. *See id.* at 458.

17. 111 N.E. 1050 (N.Y. 1916).

18. *See id.* at 1055.

19. *See* W. Prosser, Handbook Of The Law Of Torts 643 (4th ed. 1971).

20. 135 N.E. 275 (N.Y. 1922).

21. *See id.* at 277. *Glanzer* involved negligence in supplying information, and that is often the issue in legal and accounting negligence cases. *Compare id.* at 275 (public weigher negligently over weighed beans) *with* Goodman v. Kennedy, 556 P.2d 737, 740, 134 Cal. Rptr. 375, 378 (1976) (attorney negligently provided opinion) *and* Shatterproof Glass Corp.

weigh a quantity of beans for the purpose of determining the price to the buyer.[22] The weigher was well aware of the reason for weighing the beans; thus, he knew the buyer would rely on his weight calculation.[23] Because the public weigher negligently over weighed the beans, the Court of Appeals of New York held that the weigher, though he was hired by the seller, was directly liable to the buyer for his negligent misrepresentation.[24] The reason for the imposition of liability was that the defendant certified the weight with the full intention of influencing the buyer's conduct, and a duty was therefore owed to the buyer as well as to the seller who ordered the weight certification.[25]

In the landmark case of *Ultramares Corp. v. Touche*,[26] Justice Cardozo did not extend the *Glanzer* logic.[27] *Ultramares* involved creditors who were injured by reliance on a negligently performed audit by a public accounting firm.[28] Justice Cardozo reasoned that to extend the liability of the accountants to the creditors who would forseeably rely on the audit would cause the accountants to be liable in "an indeterminate amount for an indeterminate time to an indeterminate class."[29] The opinion made clear, however, that liability for fraud in preparing the audit report would not be limited by a requirement of privity.[30]

### B. *In Legal Malpractice Actions*

The leading United States Supreme Court case on the privity requirement as applied to legal malpractice is *Savings Bank v. Ward*.[31] Suit was brought by a non-client who suffered a financial loss when he relied on a

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v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants negligently prepared audit reports).

22. *See* Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922).

23. *Id.* at 275.

24. *See id.* at 277.

25. *See id.* at 277.

26. 174 N.E. 441 (N.Y. 1931).

27. *See id.* at 446. The *Ultramares* decision distinguished the facts from those in *Glanzer v. Shepard* on the basis that the information in *Ultramares* was being provided primarily for the client, not for the non-client. *See id.* at 445-46.

28. *Id.* at 443.

29. *Id.* at 444. This reasoning against abolishing the privity requirement is very similar to the English court's reasoning nearly a century earlier. *Cf.* Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842) (if court goes one step beyond privity limitation "there is no reason why we should not go fifty.").

30. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931). This exception for fraud has always been recognized in lawyer liability cases. *Cf.* Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879) (attorney would be liable to non-client for fraud or collusion); McDonald v. Stewart, 182 N.W.2d 437, 440 (Minn. 1970) (attorneys not immune from liability to third persons for actions in fraud).

31. 100 U.S. 195 (1879).

title opinion negligently prepared by an attorney.[32] The Supreme Court, in denying recovery, stated that the attorney was not liable to parties not in privity of contract unless fraud or collusion could be shown.[33]

The majority of jurisdictions in the United States, including Texas, still hold to the rule stated in *Savings Bank v. Ward*.[34] There are an increasing number of jurisdictions, however, which are abandoning the strict privity barrier to liability.[35] California has led the way in extending lawyers' liability to non-clients and has already developed ample case law which other states generally have used in analyzing the issue.[36]

## III. Categories of Non-Client Relationships to Attorneys

In analyzing whether the requirement of privity is an overly restrictive limit on the lawyer's scope of duty, the most important factor is the relationship between the attorney and the non-client.[37] This relationship gen-

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32. *See id.* at 197.

33. *See id.* at 205-06. The Court stated:

> Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.

*Id.* at 205-06.

34. *See, e.g.*, Favata v. Rosenberg, 436 N.E.2d 49, 51 (Ill. App. Ct. 1982) (Illinois law restricts attorney negligence liability to client only); McDonald v. Stewart, 182 N.W.2d 437, 440 (Minn. 1970) (attorney immune from negligence liability to non-clients); Graham v. Turcotte, 628 S.W.2d 182, 184 (Tex. Ct. App.—Corpus Christi 1982, no writ) (attorney not liable because no privity of contract existed); *see also* Annot., 45 A.L.R.3d 1181, 1185 (1972) (apparent majority of states limit duty to client).

35. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (strict privity not required for negligence action against attorneys); McAbee v. Edwards, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (privity no bar to recovery when plaintiff is intended beneficiary); Woodfork v. Sanders, 248 So. 2d 419, 421, 425 (La. Ct. App. 1971) (intended beneficiary recovered against attorney despite lack of privity).

36. *Cf.* Lucas v. Hamm, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961) (leading case holding attorneys liable to non-client will beneficiaries for negligence), *cert. denied*, 368 U.S. 987 (1962). The courts of several other states have employed the *Lucas* decision in determining the scope of an attorney's duty. *See, e.g.*, Stowe v. Smith, 441 A.2d 81, 83 (Conn. 1981) (citing *Lucas* in allowing third party to recover from attorney); McAbee v. Edwards, 340 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 1976) (following *Lucas* in imposing duty from lawyer to non-client); Marker v. Greenberg, 313 N.W.2d 4, 5 (Minn. 1981) (citing *Lucas* in analyzing scope of lawyer's duty).

37. *Cf.* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Ct. App. 1976) (attorney knew non-client would rely on his opinion); Succession of Killingsworth, 292 So. 2d 536, 542 (La. 1973) (non-client third party beneficiary of attorney-client contract); Martin v. Trevino, 578 S.W.2d 763, 772-73 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (non-client found not to be intended beneficiary and not allowed to recover).

erally depends on the connection between the non-client and a client of the attorney.[38] The interests of the client and non-client may be similar, or their interests may be conflicting.[39] The cases will be classified into three categories based on the non-client plaintiff's relationship to the attorney when the negligence occurred. The first group involves plaintiffs who were the intended beneficiaries of the attorney's work for a client.[40] The second group involves non-client plaintiffs who relied on negligent misrepresentations made by the attorney.[41] The last category involves plaintiffs who have been in an adversary relationship to the lawyer and his client and who have generally been involved in litigation against a client whom the defendant attorney is representing.[42]

## A. *Intended Beneficiaries*

The most common situation in which an intended beneficiary can be injured occurs when a will has been negligently drafted.[43] The California

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38. *See* Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 717 (1980) (relationship of attorney to non-client depends on client's relationship to non-client).

39. *Compare* Heyer v. Flaig, 449 P.2d 161, 163, 74 Cal. Rptr. 225, 227 (1969) (non-client intended beneficiary of client's will) *and* Bucquet v. Livingston, 129 Cal. Rptr. 514, 516 (Ct. App. 1976) (non-client beneficiary of inter vivos trust created by client) *with* Weaver v. Superior Ct., 156 Cal. Rptr. 745, 747 (Ct. App. 1979) (non-client and client adverse parties in litigation) *and* Martin v. Trevino, 578 S.W.2d 763, 764 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (non-client and client adverse parties in litigation).

40. *See, e.g.*, Bucquet v. Livingston, 129 Cal. Rptr. 514, 516 (Ct. App. 1976) (non-client intended beneficiary of inter vivos trust); Donald v. Garry, 97 Cal. Rptr. 191, 191 (Ct. App. 1971) (non-client intended recipient of proceeds from note collection); McAbee v. Edwards, 340 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 1976) (non-client intended beneficiary of client's will).

41. *See, e.g.*, Goodman v. Kennedy, 556 P.2d 737, 740, 134 Cal. Rptr. 375, 378 (1976) (stockholders relied on attorney's opinion on securities law); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 903-04 (Ct. App. 1976) (non-clients relied on attorney's opinion of legal status of corporation); Bell v. Manning, 613 S.W.2d 335, 336-37 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (non-clients relied on instruction relayed by lawyer's secretary).

42. *See, e.g.*, Martin v. Trevino, 578 S.W.2d 763, 764 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (doctor sued adverse party's attorney for negligently filing unfounded medical malpractice suit); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (non-client sued adverse party's attorney for indefinitely delaying litigation); Traders & Gen. Ins. Co. v. Keith, 107 S.W.2d 710, 713 (Tex. Civ. App.—Amarillo 1937, writ dism'd) (non-client not entitled to rely on opposing counsel's legal opinion).

43. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (intended beneficiary of will may recover damages from attorney who failed to make necessary testamentary change); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981) (intended beneficiary of will may recover from negligent will drafter); Succession of Killingsworth, 292 So. 2d 536, 542 (La. 1973) (intended beneficiaries may recover from negligent will drafter as third party

Supreme Court pioneered the establishment of liability of attorneys to intended beneficiaries who were deprived of their legacies.[44] In *Biakanja v. Irving*,[45] a notary public prepared a will which was declared invalid for insufficient attestation.[46] The California court imposed liability on the notary to the intended beneficiary based on several balancing factors:[47]

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[48]

In *Lucas v. Hamm*,[49] the same court again applied these balancing factors to find that an attorney negligently preparing a will could be held liable for resulting injuries.[50] In *Lucas*, the California Supreme Court stated that an intended beneficiary could recover from the negligent will drafter under tort law in negligence or under contract law as a third party beneficiary of the attorney-client contract.[51]

The highest courts of Connecticut and Louisiana recently found attorneys liable to intended beneficiaries of negligently drafted wills, under the theory that the non-clients were third party beneficiaries of the attorney-client relationship.[52] The Supreme Court of Minnesota, recently applied the *Biakanja* balancing factors to an intended beneficiary situation involving the preparation of a deed.[53] The Minnesota court emphasized

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beneficiaries of attorney-client contract).

44. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (attorney owed duty to intended beneficiary); Lucas v. Hamm, 364 P.2d 685, 688-89, 15 Cal. Rptr. 821, 824-25 (1961) (attorney would have been liable to non-client will beneficiary if negligence proved), *cert. denied*, 368 U.S. 987 (1962); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (notary who prepared will liable to intended beneficiary for negligence).

45. 320 P.2d 16 (Cal. 1958).

46. *See id.* at 17 (witnesses not present when testator signed). In addition to being negligent, the actions of the notary constituted the unauthorized practice of law. *See id.* at 19.

47. *See id.* at 19.

48. *Id.* at 19.

49. 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

50. *See id.* at 687-88, 15 Cal. Rptr. at 823-24. The plaintiffs were deprived of a bequest because the will provision violated the rule against perpetuities. *See id.* at 686, 15 Cal. Rptr. at 822. The portion of the case dealing with privity requirements was actually dicta because the attorney was not found negligent. *See id.* at 690, 15 Cal. Rptr. at 826.

51. *See id.* at 688, 15 Cal. Rptr. at 824. This logic overruled the prior case requiring privity of contract. *See* Buckley v. Gray, 42 P. 900 (Cal. 1895).

52. *See* Stowe v. Smith, 441 A.2d 81, 83 (Conn. 1981) (plaintiff is third party beneficiary of attorney-client contract); Succession of Killingsworth, 292 So. 2d 536, 542 (La. 1973) (contract term for benefit of intended beneficiary breached).

53. *See* Marker v. Greenberg, 313 N.W.2d 4, 5 (Minn. 1981). The attorney in this case

that the exceptions to the privity rule should be very limited to prevent excessive liability of attorneys.[54] Public policy calls for the liability to be extended, especially in the will drafting cases, since normally, if the beneficiary is not allowed to recover, no other party would be allowed recovery;[55] and the attorney could continue to perform this service negligently without fear of liability.[56]

In Texas, the general rule requiring privity was set forth in *Bryan & Amidei v. Law*,[57] in which the Fort Worth Court of Civil Appeals stated that the attorney owed a duty to his client only, and not to third parties.[58] The facts in that case, however, did not involve an intended beneficiary plaintiff.[59] In another Texas case,[60] the appellate court stated in dicta that because the case before them did not involve a non-client plaintiff who was an intended beneficiary, that case was not the proper case to abolish the privity requirement.[61] Such a statement certainly suggests that at least one Texas appeals court is willing to entertain the possibility of an exception to the blanket privity rule, but as yet no Texas court has done so.[62]

### B. *Parties Relying on Negligent Misrepresentations*

The second category of non-client plaintiffs consists of persons who have relied to their detriment upon negligent misrepresentations of the

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was not found negligent in preparing the deed; thus, the privity discussion was dicta. *See id.* at 6.

54. *See id.* at 5 (exceptions must be narrow to prevent myriad of actions).

55. *See* Licata v. Spector, 225 A.2d 28, 30 (Conn. C.P. 1966). Public policy permits the imposition of liability since will drafting errors are not usually detected until the testator's death. *See id.* at 30. The estate of the testator usually has no standing to sue since the estate generally suffers no injury. *See* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969).

56. *See* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (denial of recovery to intended beneficiary would frustrate effort to prevent future harm).

57. 435 S.W.2d 587 (Tex. Civ. App.—Fort Worth 1968, no writ). "It is a general rule that the duties of the attorney which arise from the relation of attorney and client, are due from the attorney to his client only, and not to third persons." *Id.* at 593.

58. *See id.* at 593.

59. *See id.* at 588-91. The complicated fact situation involved a suit by one attorney against another. The plaintiff charged the defendant with negligence in failing to see whether the defendant's client had already entered into a contractual relationship with the plaintiff. *See id.* at 588-91.

60. Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

61. *See id.* at 772.

62. *See* Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (no duty of lawyer to third party has been imposed by Texas courts).

attorney.[63] The classic situation involves a third party injured by reliance on an attorney's title opinion prepared for his client.[64] In such a factual setting, the United States Supreme Court in *Savings Bank v. Ward*[65] held that the attorney owed no duty to those not in privity of contract.[66] An important fact to be observed in *Savings Bank* is that the attorney did not know that the non-client plaintiff intended to rely on the opinion prepared for the client.[67]

This category of cases is analogous to cases in which injured plaintiffs have relied upon public accountants' opinions because in both situations the professional is providing an opinion upon which a client, and usually others, rely.[68] In *Ultramares Corp. v. Touche*,[69] the primary reason for not imposing liability on the accountants to all foreseeable plaintiffs was the possibility of exposing them to indeterminate liability;[70] however, many jurisdictions now recognize that the scope of liability may be limited. This may be accomplished, without requiring strict privity, by allowing recovery only to third parties whose reliance was actually foreseen at the time of the negligent misrepresentation, rather than to all foreseeably relying parties.[71] In *Rusch Factors, Inc. v. Levin*,[72] the federal

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63. *See, e.g.*, Goodman v. Kennedy, 556 P.2d 737, 740, 134 Cal. Rptr. 375, 378 (1976) (stockholders relied on attorney's negligently rendered opinion on securities law); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 903-04 (Ct. App. 1976) (non-clients relied on attorney's negligent assessment of corporation's legal status); Bell v. Manning, 613 S.W.2d 335, 336-37 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (non-clients relied on instruction relayed by lawyer's secretary).

64. *Cf.* Savings Bank v. Ward, 100 U.S. 195, 197 (1879) (negligent title opinion to land caused injury to non-client plaintiff).

65. *See id.* at 197.

66. *See id.* at 200.

67. *See id.* at 197. The attorney's knowledge of the third party's intent to rely has become a major factor in determining the lawyer's liability. *Compare* Goodman v. Kennedy, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976) (no liability where attorney did not know plaintiffs would rely on opinion) *with* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 903-04 (Ct. App. 1976) (attorney could be held liable where he knew plaintiffs would rely on opinion).

68. *Compare* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 903-04 (Ct. App. 1976) (attorney opinion letter relied on by third party) *with* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountant's opinion of financial position of company relied upon by third party). *See also* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (deals with negligent misrepresentation of professionals without distinguishing between professions).

69. 174 N.E. 441 (N.Y. 1931).

70. *See id.* at 444.

71. *See, e.g.*, Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851 (4th Cir. 1972) (recovery allowed to actually foreseen plaintiffs); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 92-93 (D.R.I. 1968) (recovery limited to actually foreseen plaintiffs); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 875-76 (Tex.

district court in Rhode Island found the defendant accountants liable to the plaintiff creditors who granted loans on the basis of the negligently prepared audits.[73] The court distinguished *Ultramares* wherein the plaintiffs were too remote; they were foreseeable, but not actually foreseen.[74] In *Rusch Factors,* the plaintiff was a single party whose reliance was actually foreseen,[75] and therefore, the court chose to follow the *Glanzer* rule[76] which held a certified weigher liable to a third party known by the weigher to be relying on the weight measurement.[77]

The reasoning of *Glanzer* has been incorporated in section 552 of the Restatement (Second) of Torts.[78] This section states that a person engaged in a business or profession who negligently provides false information intended to guide or influence another party is liable for the loss caused by the other party's justifiable reliance on the information.[79] This section of the Restatement has been applied to other professionals besides accountants, such as doctors and engineers, despite the lack of privity between the parties.[80]

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Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountant knew plaintiff would be furnished copy of audit).

72. 284 F. Supp. 85 (D.R.I. 1968).

73. *See id.* at 93.

74. *See id.* at 91. *Compare* Ultramares Corp. v. Touche, 174 N.E. 441, 442 (N.Y. 1931) (plaintiff in group of many foreseeable plaintiffs) *with* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D.R.I. 1968) (plaintiff was single, actually foreseen plaintiff).

75. *See* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D.R.I. 1968).

76. *See id.* at 91; *see also* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922).

77. *See* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922). *Compare id.* at 275-76 (defendant knew that weight measurement would be relied upon by third party plaintiff) *with* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968) (defendant knew that accounting certification would be relied upon by third party).

78. *Compare* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922) (liability exists where party pursuing independent calling negligently provides information to another with purpose of shaping conduct of receiver) *with* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (liability exists where professional or businessman negligently provides information for guidance of another).

79. *See* RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

> One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Id.*

80. *See* North Am. Co. for Life & Health Ins. v. Berger, 648 F.2d 305, 308 n.7 (5th Cir.) (court holds doctor liable for negligent misrepresentation under § 552 of Restatement), *cert. denied,* ___ U.S. ___, 102 S. Ct. 641, 70 L. Ed. 2d 619 (1981); Howell v. Fisher, 272 S.E.2d 19, 25 (N.C. Ct. App. 1980) (engineer liable for negligent misrepresentation under § 552 of Restatement).

In *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*,[81] a California appellate court applied similar logic in holding that a lawyer who had supplied an opinion to his client on the legal status of a corporation could be liable to a third party creditor for negligent misrepresentation.[82] The California court emphasized that the attorney's opinion was rendered for the purpose of influencing the non-client plaintiff's conduct.[83] Consequently, the court stated that it had no difficulty in holding the attorney liable for the non-client's losses.[84] In a later case, the California Supreme Court held an attorney not liable to injured third parties who purchased stock after relying on the attorney's opinion given to the client corporation.[85] The plaintiffs were not foreseen in that case,[86] and *Roberts* was distinguished because the attorney in *Roberts* knew beforehand that the third party plaintiff would be relying on his opinion.[87]

No Texas court has yet held a lawyer liable to a non-client for negligent misrepresentation,[88] but one Texas court has created this liability for certified public accountants in *Shatterproof Glass Corp. v. James*.[89] In that case the Fort Worth Court of Civil Appeals allowed the extension of liability of negligent accountants to a third party by following the logic of the federal district court in *Rusch Factors*.[90] The Texas court stressed that the accountants knew that the plaintiffs were going to rely on the audit reports in the making of loans to the accounting firm's client.[91] The court cited cases demonstrating the trend away from strict privity requirements, including the leading California case, *Lucas v. Hamm*.[92] Most significant is that the court urged the adoption of section 552 of the tentative draft of the Restatement (Second) of Torts as the law in Texas,[93]

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81. 128 Cal. Rptr. 901 (Ct. App. 1976).

82. *See id.* at 905-06.

83. *See id.* at 903-04, 906 (attorney knew client would show legal opinion to plaintiff creditor in effort to obtain loan).

84. *See id.* at 906.

85. *See* Goodman v. Kennedy, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976).

86. *See id.* at 743, 134 Cal. Rptr. at 381 (plaintiffs' only relation to attorney was that they "might" rely on his opinion).

87. *See id.* at 743 n.4, 134 Cal. Rptr. at 381 n.4.

88. *See* Bell v. Manning, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (no duty of lawyer to third party yet imposed by Texas courts).

89. 466 S.W.2d 873, 881 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

90. *See id.* at 877 (following Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 92-93 (D.R.I. 1968)).

91. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

92. *See id.* at 879 (citing Lucas v. Hamm, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962)).

93. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 879 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

and thus recognized liability of all professionals for negligent misrepresentations made with the intent that a third party plaintiff rely on them.[94]

Recently, in *Bell v. Manning*,[95] the Tyler Court of Civil Appeals addressed the issue of a lawyer's liability for negligent misrepresentations to a third party.[96] The plaintiffs relied upon the California case of *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*.[97] *Bell* erroneously stated that the *Roberts* case was based on fraud, and the *Bell* court therefore dismissed the plaintiffs' argument.[98] The *Roberts* holding, however, clearly stated that the privity requirement was excused in a cause of action of negligent misrepresentation, and not because fraud was involved.[99] The California court in *Roberts* dismissed the fraud counts because they were not properly alleged,[100] but the negligence counts stated a cause of action despite the lack of privity.[101]

The *Bell* court recognized *Shatterproof Glass* as authority for holding accountants liable under similar facts, but concluded that no Texas court has held lawyers liable for negligent misrepresentation to non-clients.[102] Despite the limited holding in *Bell*, section 552 of the Restatement, as adopted in *Shatterproof Glass Corp. v. James*, applies to all professions.[103] The step, therefore, from imposing liability on accountants to

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94. *See id.* at 878. The tentative version of the Restatement cited by *Shatterproof Glass* differs only minutely from the final verson. *Compare id.* at 878 (tentative version) *with* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (final version with slight word choice and punctuation changes).

95. 613 S.W.2d 335 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

96. *See id.* at 336-37 (non-client sued attorney for negligent misrepresentations made by attorney's secretary).

97. *See id.* at 339 (referring to plaintiffs' reliance upon Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901 (Ct. App. 1976)).

98. *See* Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.). The *Roberts* court dismissed the fraud counts and imposed liability based on negligence. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 905 (Ct. App. 1976).

99. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 905 (Ct. App. 1976) (fraud claims properly dismissed while negligence claims stated cause of action).

100. *See id.* at 903-04 (plaintiffs did not allege misrepresentation intentional).

101. *See id.* at 905.

102. *See* Bell v. Manning, 613 S.W.2d 335, 337-38 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.); *see also* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 880 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants may be held liable to non-client for negligent misrepresentation).

103. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 878-79 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (version of Restatement adopted imposes liability for negligent misrepresentation on professionals); *see also* North Am. Co. for Life & Health Ins. v. Berger, 648 F.2d 305, 308 n.7 (5th Cir.) (Restatement § 552 applied to doctor), *cert. denied*, ___U.S. ___, 102 S. Ct. 641, 70 L. Ed. 2d 619 (1981); Howell v. Fisher, 272 S.E.2d 19,

imposing a duty on attorneys is a small one.[104]

### C. *Adverse Parties*

The third category of non-clients to be discussed is composed of plaintiffs who have had a prior adversary relationship with the attorney and his client.[105] The most common fact pattern in this category involves a plaintiff who sues the opposing attorney in prior litigation for negligently bringing a groundless lawsuit.[106] The law in this category is settled.[107] Texas courts have held that no cause of action exists for an adverse plaintiff who claims that an attorney negligently brought or handled a suit against that plaintiff in an earlier case.[108] If malice can be shown, however, then a cause of action of malicious prosecution exists.[109] This is consistent with the *Savings Bank v. Ward* rule, in that wherever an intentional wrong is committed, liability is not precluded by a lack of

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25 (N.C. Ct. App. 1980) (Restatement § 552 applied to engineer).

104. *Cf.* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (liability applies to all professions).

105. *See, e.g.*, Weaver v. Superior Ct., 156 Cal. Rptr. 745, 754 (Ct. App. 1979) (doctor sued adverse party's attorney for negligence in bringing unfounded medical malpractice suit); Martin v. Trevino, 578 S.W.2d 763, 764 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (doctor sued adverse party's attorney for negligently filing unfounded medical malpractice suit); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (non-client sued opposing attorney for indefinitely delaying litigation).

106. *See, e.g.*, Berlin v. Nathan, 381 N.E.2d 1367, 1369 (Ill. App. Ct. 1978) (doctor sued attorney and client for negligently bringing suit against doctor), *cert. denied*, 444 U.S. 828 (1979); Hill v. Willmott, 561 S.W.2d 331, 332-33 (Ky. Ct. App. 1978) (doctor sued attorney who had negligently brought suit against doctor); Martin v. Trevino, 578 S.W.2d 763, 764 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (doctor filed suit against attorney for bringing suit without just cause).

107. *See* 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 (1979) (adverse parties' attempts to recover from attorney for negligently bringing unfounded suit have been "singularly unsuccessful").

108. *See, e.g.*, Martin v. Trevino, 578 S.W.2d 763, 771-72 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (lawyer owes no duty of care to adverse party in litigation); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (attorney has right to put forth any defense without fear of liability to adverse party); Traders & Gen. Ins. Co. v. Keith, 107 S.W.2d 710, 713 (Tex. Civ. App.—Amarillo 1937, writ dism'd) (attorney owes no duty to adverse party).

109. *See* Martin v. Trevino, 578 S.W.2d 763, 766 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (citing elements of malicious prosecution). Ethical standards also forbid knowingly bringing a frivolous claim. *See* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. 12, § 8 (Code of Professional Responsibility) DR7-102 (A)(1) & (2) (1973) [hereinafter cited as TEXAS CODE OF PROFESSIONAL RESPONSIBILITY]. A plaintiff may not state a private cause of action, however, by merely showing a violation of this state bar rule. *See* Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

privity.[110] An attorney should be able to zealously advocate his client's position without fear of liability to the opposing party.[111] Such a negligence action would create a conflict of interest because the attorney would owe a duty to the client to zealously advocate his position while owing a duty to the opposing party not to negligently allege unfounded claims.[112] This conflict would inhibit the lawyer from imposing all the arguments under the law in behalf of his client.[113] It is noteworthy that even the California courts, which have liberally imposed liability on attorneys to non-clients in many situations, have chosen not to extend a lawyer's liability in negligence to a plaintiff in an adverse relationship with the lawyer.[114]

## IV. Recommendations for Removal of The Privity Requirement

### A. *Intended Beneficiaries*

Liability to a non-client, intended beneficiary should be imposed on the lawyer despite lack of privity.[115] The main function of the privity requirement is to prevent unlimited liability.[116] In this category of cases, however, the plaintiffs who may have legitimate claims are certain and fore-

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110. *Compare* Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879) (if fraud or collusion can be shown then privity not required to recover) *with* Martin v. Trevino, 578 S.W.2d 763, 766 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (privity not required element in malicious prosecution).

111. *See* Ward, *Legal Malpractice in Texas*, 19 S. Tex. L.J. 587, 610 (1978); *see also* Texas Code of Professional Responsibility Canon 7 (1973) (attorney has duty to zealously advocate client's position); Model Code Of Professional Responsibility Canon 7 (1981) (attorney has duty to zealously advocate client's position).

112. *Cf.* Weaver v. Superior Ct., 156 Cal. Rptr. 745, 751 (Ct. App. 1979) (attorney's interests in avoiding liability to third party would conflict with interests of client).

113. *See* Morris v. Bailey, 398 S.W.2d 946, 947-48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (fear of liability to adverse party might inhibit lawyer from presenting a valid defense).

114. *See* Weaver v. Superior Ct., 156 Cal. Rptr. 745, 753-54 (Ct. App. 1979). The California court found that the policy of not impeding access to the courts prohibited the imposition of a duty on the lawyer to an adverse party. *See id.* at 754.

115. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (strict privity not required in intended beneficiary case); McAbee v. Edwards, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (privity not bar to recovery when plaintiff is intended beneficiary); Woodfork v. Sanders, 248 So. 2d 419, 425 (La. Ct. App. 1971) (intended beneficiary may recover against attorney despite lack of privity).

116. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (privity required to prevent liability to unascertainable plaintiffs); Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842) (privity required to prevent liability to large unascertainable group such as bystanders).

seeable.[117] Prevention of a conflict of interest is not a valid reason for upholding the privity requirement because when the plaintiff is an intended beneficiary of the client, the desires of the plaintiff and the client conform.[118] Liability may be imposed by holding that the plaintiff is a third party beneficiary to the attorney-client contract or by holding that the attorney owes the plaintiff a duty founded in tort despite the lack of privity.[119] Public policy also supports the imposition of liability to this non-client because an attorney may completely escape liability for his negligence if strict privity is always required.[120]

Once the privity requirement is dismissed, the scope of duty can be properly limited by applying the balancing factors established in the California Supreme Court cases of *Biakanja v. Irving* and *Lucas v. Hamm*.[121] These factors will establish whether a true "intended beneficiary" situation exists on a case by case basis, rather than by the application of a strict and often unfair privity rule.[122] The balancing factors have gained acceptance in several states and have aided in the evaluation of many cases.[123]

The Texas courts have not decided a classic "intended beneficiary"

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117. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (plaintiffs certain and foreseeable); Licata v. Spector, 225 A.2d 28, 29-30 (Conn. C.P. 1966) (injury to intended beneficiary foreseeable); McAbee v. Edwards, 340 So. 2d 1167, 1169-70 (Fla. Dist. Ct. App. 1976) (plaintiffs certain and foreseeable).

118. *Cf.* Heyer v. Flaig, 449 P.2d 161, 164, 74 Cal. Rptr. 225, 228 (1969) (attorney undertakes to perform for both client and intended beneficiary).

119. *See* Lucas v. Hamm, 364 P.2d 685, 688-89, 15 Cal. Rptr. 821, 824-25 (1961), *cert. denied*, 368 U.S. 987 (1962); United Leasing Corp. v. Miller, 263 S.E.2d 313, 317-18 (N.C. Ct. App. 1980).

120. *See* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (if liability not imposed "policy of preventing future harm would be frustrated"); Licata v. Spector, 225 A.2d 28, 30 (Conn. C.P. 1966) (public policy permits liability since testator-client would usually be dead when error detected).

121. *See* Lucas v. Hamm, 364 P.2d 685, 687, 15 Cal. Rptr. 821, 823 (1961), *cert. denied*, 368 U.S. 987 (1962); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).

122. *See* Lucas v. Hamm, 364 P.2d 685, 687-88, 15 Cal. Rptr. 821, 823-24 (1961) (court applied balancing factors to determine extent of lawyer's duty to non-client), *cert. denied*, 368 U.S. 987 (1962). The *Lucas* court actually applied one less balancing factor than *Biakanja* had applied earlier. The five factors applied in *Lucas* follow:

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

*Id.* at 687, 15 Cal. Rptr. at 823.

123. *See, e.g.*, McAbee v. Edwards, 340 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 1976) (cited *Biakanja* balancing factors); Marker v. Greenberg, 313 N.W.2d 4, 5-6 (Minn. 1981) (quoted and applied *Lucas* balancing factors); Guy v. Liederbach, 421 A.2d 333, 335 (Pa. Super. Ct. 1980) (applied *Lucas* balancing factors).

case such as one involving an intended will beneficiary deprived of his bequest by negligent will drafting.[124] Nevertheless, where an attorney's negligent malpractice injures a true intended beneficiary, privity should not bar recovery against the attorney.[125] Since justice demands that the loss be borne by the party at fault,[126] and because the possible number of plaintiffs in this category is limited,[127] Texas courts should not deny the injured party a remedy.

### B. *Parties Relying on Negligent Misrepresentations*

Attorneys should be liable for negligent misrepresentations to those plaintiffs actually foreseen who are intended to rely on the information.[128] The Restatement (Second) of Torts, section 552, already cited as law by one Texas court,[129] provides a proper standard of the law. The Restatement view does not impose an undue burden on the legal profession since no unforeseen plaintiffs would recover.[130]

The scope of the duty in negligent misrepresentation cases should not be expanded to the outer limits of foreseeability.[131] The fears of unlimited liability expressed in *Ultramares* and *Winterbottom* would become realities, resulting in an undue burden on the legal profession.[132] But as to

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124. *See* Beyer, *Attorney Liability to Will Beneficiaries and How to Avoid It*, in FROST BANK ESTATE PLANNING DEVELOPMENTS, ch. 3, at 6 (August 1982).

125. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (strict privity not required in intended beneficiary case); McAbee v. Edwards, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (privity not bar to recovery when plaintiff is intended beneficiary); Woodfork v. Sanders, 248 So. 2d 419, 425 (La. Ct. App. 1971) (intended beneficiary may recover against attorney despite lack of privity).

126. Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 ST. MARY'S L.J. 77, 96 (1980).

127. *Cf.* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (intended beneficiaries were certain and foreseeable).

128. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Ct. App. 1976).

129. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 879 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

130. *Cf.* Goodman v. Kennedy, 556 P.2d 737, 743 n.4, 134 Cal. Rptr. 375, 381 n.4 (1976) (distinguishing earlier case which imposed duty on attorney where plaintiff foreseen). The *Goodman* case involved unforeseen plaintiffs, and liability was not imposed because it would create an undue burden on the legal profession. *See id.* at 743, 134 Cal. Rptr. at 381. Nevertheless, the *Goodman* court agreed with an earlier case imposing liability where the plaintiffs were actually foreseen. *See id.* at 743 n.4, 134 Cal. Rptr. at 381 n.4.

131. *See* Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 709 (1980) (widening scope to foreseeability would overburden lawyers).

132. *See* Goodman v. Kennedy, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976) (party who relied on misrepresentation not actually foreseen).

those non-client plaintiffs who were intended by the lawyer to rely on the lawyer's statements, the courts should not hesitate to impose a duty of due care.[133] The scope of the lawyer's duty should pattern that of other professionals,[134] and no profession should be exempted from owing a duty without a valid reason for the distinction.[135]

One Texas court has rejected abolishing the privity requirement in a negligent misrepresentation action against an attorney[136] although that court recognized such a duty on accountants in Texas.[137] The court offered no logical reason for this distinction, other than that no Texas court had ever imposed this liability on attorneys before.[138] Nevertheless, the demise of the privity defense to accountants makes the imposition of liability on attorneys in Texas inevitable,[139] and future Texas decisions should apply this duty evenly to all professions.[140]

### C. *Adverse Parties*

The adverse plaintiff should not be allowed to recover against the opposing attorney for negligence in bringing or handling his client's suit.[141]

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133. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901, 906 (Ct. App. 1976) (party who relied on misrepresentation actually foreseen).

134. *Compare id.* at 906 (attorney owed duty to third party where he knew that party would rely) *with* North Am. Co. for Life & Health Ins. v. Berger, 648 F.2d 305, 308 (5th Cir.) (doctor potentially liable for negligent health certifications to third party where doctor knew that party would rely), *cert. denied*, ___U.S.___, 102 S. Ct. 641, 70 L. Ed. 2d 619 (1981) *and* Howell v. Fisher, 272 S.E.2d 19, 25 (N.C. Ct. App. 1980) (engineer could be held liable for negligent report to third party where engineer knew report would be used to induce third party) *and* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876, 879 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants could be held liable to third party where accountants knew third party would rely on negligently prepared reports).

135. *See* Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 728 (1980) (no profession should be an island of legal immunity).

136. *See* Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

137. *See id.* at 337-38.

138. *See id.* at 338.

139. *See* Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587, 611 (1978) (decision in *Shatterproof Glass* imposing liability on accountants in Texas makes lawyer liability imminent).

140. *Cf.* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (all professions are included under this rule).

141. *See, e.g.*, Weaver v. Superior Ct., 156 Cal. Rptr. 745, 753-54 (Ct. App. 1979) (attorney not liable to adverse party for negligently filing groundless suit); Berlin v. Nathan, 381 N.E.2d 1367, 1376 (Ill. App. Ct. 1978) (doctor could not recover from attorney who negligently brought frivolous suit), *cert. denied*, 444 U.S. 828 (1979); Hill v. Willmott, 561 S.W.2d 331, 334 (Ky. Ct. App. 1978) (attorney not liable in negligence for filing unfounded suit).

The dangers of creating a conflict of interest and of inhibiting a lawyer in performing his duty of zealously advocating his client's position are too great to allow liability for less than intentional or malicious conduct.[142] The cause of action for malicious prosecution is still available where the attorney intentionally brings an unfounded action.[143] Unlike the others, cases in this category have been consistently decided and do not appear to be in a state of change.[144]

Texas courts have uniformly denied recovery in negligence actions brought by plaintiffs in an adversary relationship with the attorney's client,[145] even when the increasing number of exceptions to the strict privity requirement in intended beneficiary cases has been recognized.[146] This distinction should be observed in future Texas decisions as well.[147]

## V. CONCLUSION

Examining the circumstances of the relationship of a non-client to a negligent lawyer will yield a better rule to determine whether privity should remain a bar to a particular cause of action. In categories where the privity requirement is lifted, the courts will still have the ability to limit liability by carefully defining the cases where a recovery should be allowed.[148] Although not all cases will fit neatly into these categories,[149] analyzing the fact situations on a case by case basis in the manner set

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142. *See* Morris v. Bailey, 398 S.W.2d 946, 947-48 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.); *see also* Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587, 610 (1978) (imposing liability would interefere with lawyer's duty to zealously advocate).

143. *See* Martin v. Trevino, 578 S.W.2d 763, 766 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (court cites elements of malicious prosecution claim).

144. *See* 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 (1979).

145. *See, e.g.*, Martin v. Trevino, 578 S.W.2d 763, 771 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e) (attorney owes no duty to adverse party for negligently bringing unfounded suit); Morris v. Bailey, 398 S.W.2d 946, 947 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (attorney may impose any defense available without incurring liability to adverse party); Traders & Gen. Ins. Co. v. Keith, 107 S.W.2d 710, 713 (Tex. Civ. App.—Amarillo 1937, writ dism'd) (attorney owes no duty to adverse party for actions as client's attorney).

146. *See* Martin v. Trevino, 578 S.W.2d 763, 772 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

147. *See generally* Thode, *The Groundless Case—The Lawyer's Tort Duty to His Client and to the Adverse Party*, 11 ST. MARY'S L.J. 59, 72-73 (1979).

148. *See* Goodman v. Kennedy, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976) (to impose liability in this case would be undue burden on legal profession); Marker v. Greenberg, 313 N.W.2d 4, 5 (Minn. 1981) (exceptions to privity must be limited).

149. *Cf.* Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 716-17 (1980) (relationship of attorney to non-client ranges from harmonious to adverse).

forth in this comment will provide a fairer solution to the problem of lawyer liability for negligence to non-clients, than will a blanket requirement of privity in all situations. The one-hundred-forty-year-old justification for the privity of contract limitation, that unlimited liability could be prevented in no other way,[150] has now been discredited in many instances. Justice demands that with regard to the privity requirement, as with any other rule, "when the reason for the rule ceases, the rule also ceases."[151]

150. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 404 (Ex. 1842) (privity requirement needed to prevent myriad of actions).

151. Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 ST. MARY'S L.J. 77, 101 (1980); *accord* 2 W. BLACKSTONE, COMMENTARIES 390-91 (1st Am. ed. 1771) (Latin phrasing).