Malpractice in Estate Planning: Some Guidance on How to Avoid It

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Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

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Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils. Mr. Redd is listed in The Best Lawyers in America and is "Band 1" ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

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A. WHAT CONSTITUTES MALPRACTICE?

The term "malpractice" is, in part, a way of referring to negligence in the professional setting. A lawyer commits malpractice (or engages in negligence) when he or she, in the rendering of legal services, engages in an act or omission resulting in harm to another in which a competent lawyer, in the exercise of reasonable care, would not have engaged. Sometimes, the term "malpractice" is used to refer to the damaging acts or omissions of a professional that transcend failure to exercise reasonable care and involve recklessness or willful misconduct.

B. INTERRELATIONSHIP OF LEGAL ETHICS RULES AND MALPRACTICE CLAIMS

In a malpractice action, the plaintiff generally must prove a duty on the part of the lawyer, the failure of the lawyer to exercise the ordinary skill and knowledge required of a lawyer and that such failure caused damage to the plaintiff. For the plaintiff to prove the failure of a lawyer to exercise the ordinary skill and knowledge required of a lawyer, it will often be helpful to show a violation of the applicable ethical standards. The plaintiff would argue that a reasonable lawyer would have followed such ethical standards, that failure to follow these standards is a failure to follow the standard of care expected of a reasonable lawyer and that this failure caused harm to the plaintiff. *See, generally*, Richmond, *Why Legal Ethics Rules Are Relevant To Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007).

As explained by the Model Rules of Professional Conduct Scope Comment 20, a violation of the ethics rules is not tantamount to malpractice: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached… The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."

The Model Rules go on to state, however, that "since the Rules do establish standards of conduct by attorneys, an attorney's violation of a Rule may be evidence of breach of the applicable standard of conduct." While most courts agree that a violation of the ethics rules does not by itself establish a malpractice claim, *see, e.g., Mainor v. Nault*, 101 P.3d 308 (Nev. 2004); *Davis v. Findley*, 422 S.E.2d 859 (Ga. 1992), courts have taken different stances on the admissibility and reliability of ethics violations in malpractice proceedings.

Most states permit admission into evidence of a lawyer's violation of the ethics rules and/or specific references by expert witnesses to such rules. *See, e.g., Desimini v. Durkin*, 2015 WL 3408749 (D.N.H. 2015) (following the majority rule that an expert witness' opinions about whether a defendant's conduct violated ethical rules may be relevant to the standard of care in

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legal malpractice cases); *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176 (Ill.App. 1992) (approving a jury instruction specifically quoting Illinois' version of Rule 1.1 (Competence)); *Pressley v. Farley*, 579 So.2d 160 (Fla.App. 1991); *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986) (holding that, "if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence" but also holding that "expert testimony concerning the fact of an ethical violation is not appropriate.").

A Michigan court has ruled that, if a plaintiff establishes a violation of the ethics rules by a defendant lawyer, there is a rebuttable presumption of malpractice. In *Lipton v. Boesky*, 313 N.W.2d 163 (Mich.App. 1981), the lawyer represented the plaintiffs in connection with litigation over the construction of an office building. When the plaintiffs later sued their lawyer for malpractice, they alleged numerous violations of Michigan's Code of Professional Responsibility. The court, reasoning that the ethics rules establish a standard of conduct and that clients should be able to assume that such standard will be met during the course of the representation, held that a violation of the Model Rules is rebuttable evidence of malpractice. A later Michigan case held, while adhering to the general principles of *Lipton*, that the plaintiff usually must present expert testimony as to the defendant's violation of the conflict of interest rules before the rebuttable presumption of malpractice arises. *Beattie v. Firnschild*, 394 N.W.2d 107 (Mich.App. 1986); *see, also, Hart v. Comerica Bank*, 957 F.Supp. 958 (E.D. Mich. 1997).

Courts in California and Pennsylvania have gone even further, holding that, depending on the facts, expert testimony is not necessary to establish a violation of the ethics rules. *David Welch Co. v. Erskine & Tulley*, 203 Cal.App.3d 884 (1988) ("The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony"); *Rizzo v. Haines*, 555 A.2d 58 (Pa. 1989).

In contrast, the Supreme Court of Washington, in *Hizey v. Carpenter*, 830 P.2d 646 (Wash. 1992), appeared to be much less receptive to a plaintiff's use of the rules of professional conduct or responsibility in malpractice actions against lawyers. The court explained that the ethics rules, which were designed to regulate the relationships among the lawyer, the client and the court, were not meant to be applied in malpractice cases, which concern only the relationship between the lawyer and the client. Applying the ethics rules in malpractice cases would cause lawyers to elevate those ethics rules that primarily regulate the relationship between the lawyer and client over those ethics rules that primarily regulate the relationship between the lawyer and the court. While holding that no reference may be made to the ethics rules, the court nevertheless permitted an expert to testify in reliance on the ethics rules, effectively diluting its position on this issue.

Other decisions are consistent with *Hizey* in holding that professional ethics rules are inadmissible in a legal malpractice claim. *See Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366 (Ark. 1992) (holding that the lower court did not err by refusing to admit into evidence the Model Rules of Professional Conduct because such rules were meant as guidelines only, not to establish a civil cause of action for malpractice); *Webster v. Powell*, 391 S.E.2d 204 (N.C.App. 1990) (holding that the trial court properly excluded evidence of a breach of a rule of professional conduct because such breach is not a basis for civil liability and, therefore, was irrelevant to the malpractice claim).

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Alabama law effectively eliminates any reliance upon ethics rules as proof of negligence. Under Ala. Code § 6-5-578, a violation of an ethics rule does not give rise to an independent cause of action, and evidence of a violation of an ethics rule or of any action taken in response to a charge of an ethics rule violation is inadmissible in a malpractice action.

C. POTENTIAL LIABILITY TO NON-CLIENTS

1. In General

Under some circumstances, a lawyer may be held liable to non-client, third-party beneficiaries. Liability to third parties in this context depends on whether the jurisdiction in which the lawyer rendered legal services adheres to the strict privity doctrine or whether such jurisdiction allows third parties to proceed against the lawyer under a negligence theory, a third-party beneficiary contract claim or a combination of the two.

2. Strict Privity Doctrine

The one-time prevailing view was that of strict privity. Under the privity rule, a lawyer is held liable only to the client and not to beneficiaries or intended beneficiaries. The jurisdictions adhering to this doctrine have refused to grant standing to non-client beneficiaries under either a negligence or third-party beneficiary contract theory.

Some states still adhere to the strict privity rule, including Arkansas, Ohio, Colorado and Alabama. *See, e.g., Baker v. Wood, Ris & Hames, Prof'l Corp.*, 364 P.3d 872 (Col. 2016); *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002); *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167 (Ohio 2008); Ark. Code Ann. § 16-22-310 (stating that strict privity applies except in cases of fraud or intentional misrepresentation or cases in which the lawyer was aware that the primary intent of the services provided was to benefit the plaintiff). Texas and New York generally adhere to the strict privity doctrine, *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996); *Deeb v. Johnson*, 566 N.Y.S.2d 688 (1991), but allow an Executor to bring a malpractice claim against a decedent's estate planning lawyer on the estate's behalf. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006); *Schneider v. Finmann*, 933 N.E. 2d 718 (N.Y.App. 2010).

Generally, in states that follow the strict privity rule, non-clients have standing to bring only claims alleging fraud or negligent misrepresentation. Kelly, *Put Privity in the Past: A Modern Approach for Determining When Washington Attorneys Are Liable to Nonclients for Estate Planning Malpractice*, 91 WASH L. REV. 1851 (2016).

3. Imposition of Liability

The vast majority of jurisdictions to consider the issue have eliminated the strict privity doctrine and allowed non-client beneficiaries to bring claims under either: (a) a "balancing factors method" under a negligence theory; or (b) a breach of contract theory as a third-party beneficiary. Most states, including Florida, California, Pennsylvania and Illinois, allow non-client beneficiaries or intended beneficiaries to bring a claim for negligent estate planning services.

A notable case adopting this approach is *Blair v. Ing*, 21 P.3d 452 (Haw. 2001). In 1988, Lloyd and Joan Hughes, the plaintiffs' parents, retained a lawyer named Lawrence Ing to prepare an estate plan, including a revocable trust instrument. Lloyd died in 1996 and Joan died in 1997. The plaintiffs were the sole named beneficiaries of the trust and the successor Trustees.

Upon review by another lawyer of the trust instrument drafted by Ing, the plaintiffs were informed that there were costly errors and omissions. Subsequently, the plaintiffs filed suit against Ing, who was accused of not including a funding formula for the credit shelter trust created under the trust instrument.

The lower court dismissed the claims against Ing because it concluded that the appellants lacked standing to sue. In addition, the lower court reasoned that, because the trust did not on its face provide any intent to minimize taxes or to maximize the plaintiff's interests, Ing did not owe any duty to the plaintiffs.

The Hawaii Supreme Court examined the history of the strict privity doctrine and the reasoning underlying its application. The court ultimately refused to apply the strict privity doctrine to this case. It then proceeded to discuss the other applicable theories of liability.

a. <u>Balancing Factors Approach Under a Negligence Theory</u>. The *Blair* court adopted the balancing approach discussed in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961); *see, also, Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. banc. 1995); *Fabian v. Lindsay,* 765 S.E.2d 132 (S.C. 2014). *Lucas* stated that whether a particular defendant can be liable to a third person not in privity with the defendant is a matter of public policy, requiring the balancing of six factors:

1) The extent to which the transaction was intended to affect the plaintiff;
2) The foreseeability of harm to the plaintiff;
3) The degree of certainty that the plaintiff suffered injury;
4) The closeness of the connection between the defendant's conduct and the injury;
5) The policy of preventing future harm; and
6) Whether imposing liability places an undue burden upon the legal profession.

b. <u>Third-Party Beneficiary Under a Contract Theory</u>. The *Blair* court also examined the possible applicability of a third-party beneficiary theory. The focus in this theory is whether the primary purpose of the attorney-client relationship was to benefit the non-client beneficiary. The court then adopted the approach in *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983). In *Guy*, the Pennsylvania Supreme Court provided a two-part test for determining whether a person is an intended beneficiary:

1) The court should determine whether the recognition of the beneficiary's right is appropriate to effectuate the intention of the parties; and
2) The performance of services must satisfy an obligation of the promisee to pay money to the beneficiary, or the circumstances

> must indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

See, also, Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So.2d 1378 (Fla. 1993); *Kinney v. Shinholser*, 663 So. 2d 643 (Fla. Dist. Ct. App. 1995); *Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987); *Ogle v. Fuiten*, 466 N.E.2d 224 (Ill. 1984).

The *Blair* court held that a non-client beneficiary has standing to bring suit under *either* theory. In contrast, some jurisdictions have limited the beneficiaries to only one theory, either negligence or contract. *See, e.g., Guy, supra*.

While holding that a lawyer cannot be held liable for every mistake made in his or her practice, especially for errors as to a question of law as to which reasonable doubt exists, the court held that the duty to a third party must be decided on a case-by-case basis. The court concluded that Ing owed a duty to the appellants, and his errors in preparing the decedent's estate planning documents breached that duty.

D. MISCELLANEOUS ESTATE PLANNING MALPRACTICE HAZARD ZONES

1. Information Gathering

It is up to the estate planner to gather all information from the client so that the planner has a foundation of knowledge that will enable him or her to formulate an effective estate plan for the client. Such information would include basic statistical data about the client and his or her family, comprehensive information about the nature of the client's assets, the manner in which they are registered or titled and their value (or at least a reasonable approximation thereof), the manner in which the client desires to dispose of his or her property (taking into account any possible order of deaths and other contingencies) and who the client wishes to designate in various initial and successor fiduciary roles (personal representative, trustee, attorney-in-fact, etc.). If an estate plan has unintended negative consequences and the lawyer's file shows he or she implemented a plan without knowing all the relevant and material facts, it is likely the disappointed beneficiaries will have a cause of action against the lawyer for negligence. Unfortunately, it is a frequent temptation to estate planning lawyers to draft "simple" instruments for "simple" situations without having gone through an appropriate information gathering process. This approach to estate planning is unprofessional and is often a precursor to future problems.

2. Holding Custody of Signed Documents

There is a wide disparity of opinion whether the lawyer who prepares a client's estate planning documents should provide safekeeping services for such documents. Further, the answer to this question may vary depending on whether the client made an unsolicited request to the lawyer, or the lawyer volunteered, to provide such services. *See, e.g., State v. Gulbankian*, 54 Wis.2d 605, 196 N.W.2d 733 (1972). A benefit to the lawyer's providing such services is that documents presumably will be immediately available when the lawyer is contacted with news that the documents are needed (e.g., in the event of the client's incapacity or death). However, a lawyer who assumes the responsibility for maintaining possession of original estate planning documents and providing safekeeping services takes on significant liability risk if the lawyer is

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not able to locate the documents when they are needed and, as a result, the client or the beneficiaries are damaged. In addition, although perhaps unlikely, it is not beyond the realm of the possible that a lawyer who holds his or her client's signed estate planning documents implicitly assumes responsibility for keeping those documents up to date.

In many states, a person having custody of a decedent's will is legally obliged to deliver that will to the court – either the court that would have jurisdiction over the administration of the decedent's estate or the court in the county where the will is found. *See, e.g.*, Section 473,043, RSMo. In addition, in some states, a will must be probated, if at all, within a time frame mandated by statute. For example, in Missouri, the absolute time limit for presenting a will for probate is one year after the decedent's death. Section 474.050, RSMo. A lawyer who has possession of a decedent's original will and does not take steps to file it and/or present it for probate within the time prescribed by statute or, worse, takes steps to conceal a decedent's will, may be subject to a contempt citation and may also have liability to the beneficiaries under the will for damages suffered as a direct result of failure to have the will probated.

3. Asset Transfers and Beneficiary Designations

The estate planner should be sure he or she has a crystal clear understanding with the client concerning who shall have responsibility for implementing asset transfers and beneficiary designations. If assets intended to be conveyed to a revocable trust are not held in the trust at the time the asset owner becomes incapacitated or dies, the important goal of probate avoidance will be thwarted. If policies of insurance on the life of a client or other assets intended to be excluded from the gross estate for estate tax purposes have not been transferred to the intended irrevocable trust(s) or other recipient(s), there could be unexpected disadvantageous estate tax consequences.

Given that assets of substantial value, such as life insurance, IRAs and qualified retirement plans, often pass by beneficiary designation, failure carefully to coordinate beneficiary designations with other aspects of a client's overall estate plan could result in serious distortion of the estate plan.

The lawyer should strive to be in a position where he or she has provided the necessary asset transfer and beneficiary designation assistance or has a clear understanding with the client (preferably in an engagement letter) that the lawyer is not responsible for so doing.

4. Client Dies Before Signing Documents

There is a line of cases dealing with the liability exposure of a lawyer whose client died before executing his or her new estate planning documents. Notwithstanding that many jurisdictions have expressed a willingness to allow non-client beneficiaries under a will to sue the drafting lawyer where the will was negligently prepared, *see, e.g.*, *Blair v. Ing*, 21 P.3d 452 (Haw. 2001), the cases that have addressed whether a non-client beneficiary can sue an estate planner for failure to complete the execution of an estate planning document before the client died have found that the estate planner was not liable in tort to the disappointed beneficiaries.

a. ***Radovich v Locke-Paddon***. In *Radovich v. Locke-Paddon*, 41 Cal. Rptr. 2d 573, 35 Cal.App.4th 946 (1995), the client initially executed a will in 1985. In June 1991, the lawyer met with the client to discuss drafting a new will. The lawyer learned at that time that the

client was suffering from breast cancer for which she was receiving chemotherapy treatments. The lawyer sent the client "a rough draft" of the new will in October 1991. The client subsequently died in December 1991 without signing the new will.

The proposed beneficiary of the "new" will brought a malpractice claim against the lawyer for failing to obtain the decedent's execution of the new will. The theory of the claim was that the lawyer owed a duty of care and reasonable diligence to the proposed beneficiary.

The court acknowledged the trend moving away from a strict privity rule to one holding lawyers potentially liable to third parties. However, the court refused to extend this trend to a situation where the decedent never signed the will. The court reasoned that to hold a lawyer accountable for not having documents signed before a client's death may cause lawyers to rush clients into signing testamentary documents. This would clearly violate the lawyer's duty to the client by putting the interests of the beneficiaries ahead of the client's interests. *See also Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002) (holding that lawyer did not owe a duty to intended estate beneficiary where client was in ill health and lawyer had concerns about client's capacity to sign because imposing such a duty "could compromise the attorney's duty of undivided loyalty to the client"); *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009) (holding same relying, in part, on rationale in *Sisson*).

The court cited the holdings of two other jurisdictions dealing with similar facts. *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); *Gregg v. Lindsay*, 649 A.2d 935 (Pa. Super. Ct. 1994).

In *Krawczyk*, the decedent instructed the lawyer to prepare two trust agreements ten days before he died and after informing the lawyer he was about to undergo open-heart surgery. The court held that "the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client." The court felt that imposition of such a duty would create an incentive for the lawyer to encourage clients to execute documents to avoid a potential suit by third parties.

In *Gregg*, the lawyer visited with the client in the hospital and was directed to draft a new will. The lawyer drafted a will and brought it to the hospital that night. When two witnesses could not be found, the lawyer left and returned the next day with the will. However, the client had died by that time. The proposed beneficiary sued the lawyer on a third-party beneficiary contract claim. The court held that "this is nothing more than a case in which the testator died before he had executed a new will" and refused to extend liability to the lawyer. The court emphasized the potential for mischief by third parties who could theoretically call a lawyer, dictate the terms of a will for a hospitalized client and then sue the lawyer as an intended beneficiary if the will is not signed.

The court in *Radovich* then determined that without an executed will it could not find an express intent to help the beneficiary ("the only person who can say what he or she intended – has died") and further that harm to the beneficiary was not sufficiently foreseeable.

The court implied that the testatrix may have wanted to discuss the documents with her sister prior to executing them, and may have decided that the new documents would not effectuate her intent, or may simply have changed her mind.

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> We acknowledge that in the circumstances it would have been professionally appropriate, at least, for [attorney] to have inquired of the decedent whether she had any question or wished further assistance in completing the change of testamentary disposition she had discussed with him. But on weighing the relevant policy considerations we conclude that [attorney] and the law firm owed no duty to [beneficiary].

b. ***Hall v. Kalfayan***. In a similar vein, the court in *Hall v. Kalfayan*, 190 Cal.App.4th 927 (Cal.App. 2010), ruled that the claimant was unable to proceed with his claim against an estate planning lawyer. Carlyle Hall had known Alexandra Turner since 1962 or 1963. In the late 1990s, Ms. Turner exhibited signs of dementia. In 2001, Mr. Hall, through counsel, filed a petition to establish a conservatorship and requested that he be appointed as co-conservator of Ms. Turner's person and as conservator of Ms. Turner's estate. In January of 2002, Lawrence Kalfayan was appointed by the probate court to represent Ms. Turner's interests with respect to the conservatorship petition.

In February of 2002, Mr. Kalfayan met with Ms. Turner and confirmed that Ms. Turner had a lengthy and positive relationship with Mr. Hall and that Ms. Turner wanted to leave a 17th century painting to Mr. Hall. Mr. Kalfayan recommended to the court that a conservatorship be established, and Mr. Hall was appointed conservator for Ms. Turner.

In 2004, Sean Higgins, who represented Mr. Hall as conservator, informed Mr. Kalfayan that, given Ms. Turner's financial, physical and mental circumstances, Mr. Hall wished to obtain court approval of an estate plan for Ms. Turner. Subsequently, in November of 2004, Ms. Turner advised Mr. Kalfayan that Mr. Hall should inherit her condominium because she was very fond of him. Additionally, Ms. Turner expressed that no other relative should receive anything from her and that the remainder of the estate should go to Mr. Hall so that he could decide who should receive her estate.

In subsequent meetings, Ms. Turner advised Mr. Kalfayan that she desired to leave "more than half" of her estate to Mr. Hall and "less than half" of her estate to her niece, Priscilla Waring. Mr. Kalfayan then filed a petition with the probate court to approve a new estate plan for Ms. Turner favoring Mr. Hall. However, Ms. Waring filed objections to the petition representing that Ms. Turner already had an estate plan in place.

Ms. Turner died in August of 2007. Her new estate plan had not been approved by the court, and, as a result, Mr. Hall received nothing. Mr. Hall sued Mr. Kalfayan for legal malpractice, alleging that Mr. Kalfayan's failure timely to perform his duties had deprived him of the majority of Ms. Turner's estate. The trial court granted Mr. Kalfayan's motion for summary judgment, and Mr. Hall appealed to the California Appellate Court.

The California Appellate Court stated that, in cases where a potential beneficiary of a decedent's estate seeks to recover for negligence where the will or trust has not been executed, California courts have refused to extend liability. *Radovich v. Locke-Paddon*, 35 Cal.App.4th 946 (1995); *Chang v. Lederman*, 172 Cal.App.4th 67 (2009). In this instant matter, the California Appellate Court agreed with the holdings in *Radovich and Chang*, explaining that there is a need for clear delineation of a lawyer's duty to non-clients. In the absence of an executed (and in this instance, approved) testamentary document naming Mr. Hall as a

beneficiary, Mr. Hall was only a potential beneficiary. Mr. Kalfayan's duty was to the conservatorship on behalf of Ms. Turner; he did not owe Mr. Hall a duty of care with respect to the preparation of an estate plan for Ms. Turner. The court also considered other factors including the limited conversations between Ms. Turner and Mr. Kalfayan regarding her estate plan, the uncertainty that a court would approve the proposed plan and the potential liability to Mr. Kalfayan from beneficiaries of Ms. Turner's existing estate plan. *See, also*, *Estate of Agnew v. Ross*, 152 A.3d 247 (Pa. January 19, 2017) (holding that individuals who are named in an unexecuted testamentary document but not named in the testator's previously-executed testamentary document do not have standing to bring a legal malpractice actions against testator's attorney).

5. Changes in Composition of Client's Family and/or Nature and Extent of Client's Assets

In *McAbee v. Edwards*, 340 So.2d 1167 (Fla.App. 1976), a client asked a lawyer to prepare a will naming the client's daughter as sole beneficiary. The lawyer failed to advise the client that the will would have to be re-executed after the client remarried. The court held that the beneficiary stated a cause of action against the lawyer.

In *Stangland v. Brock*, 747 P.2d 464 (Wash. 1987), in 1979, attorney-at-law Norman Brock prepared a will for Ralph Schalack that left all of Schalack's real property to Alvin Stangland and Bruce Kintschi. At the time the will was signed, the decedent's farm was the substantial asset of his estate. The residue of the estate was bequeathed to different individuals.

In February 1982, attorney-at-law Kenneth Carpenter, a real estate lawyer practicing in the same law firm as Brock, prepared a sales contract for the decedent's farm. Brock was not aware that the property was being sold. Carpenter stated that he had no knowledge of the terms of Schalack's will.

Schalack died on May 7, 1982. Stangland and Kintschi brought an action against Brock, Carpenter and their law firm seeking damages for professional negligence. Specifically, the complaint alleged that Brock was negligent in not drafting the will to provide that the farm (or the proceeds of its sale) would ultimately pass to Stangland and Kintschi, as was, according to Stangland and Kintschi, the intent of the decedent. In addition, the lawyers were alleged to have been negligent by not advising the decedent that entering into the sale of the property would frustrate the decedent's intent under his will.

The court first examined whether Stangland and Kintschi had standing to bring a suit. The court opted to follow the modern trend of relaxing the privity rule where there is found an implied duty to the intended beneficiaries under the will and proceeded to review the facts under both the multi-factor balancing test and the third-party beneficiary theory.

The court found that, notwithstanding that Brock was a member of the same law firm as Carpenter, Brock had no duty to advise the decedent of the contract's possible effect on his estate plan. The court stated:

> If we held that Brock had such a duty, we would be expanding the obligation of a lawyer who drafts a will beyond reasonable limits. While an individual retains an

> attorney to draft his will the attorney's obligation is to use the care, skill, diligence and knowledge that a reasonable, prudent lawyer would exercise in order to draft the will according to the testator's wishes. Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme established in the will is maintained. The time and expense that would be required for the attorney to follow all of the testator's activities with respect to his property would prevent the attorney from being able to provide reliable and economical services to that client, and would constitute an overwhelming burden on the attorney's practice as a whole.

The court further found that Carpenter had no reason to know of the contents of the decedent's will and could not have foreseen that the sale of the property would possibly harm Stangland and Kintschi. The court's holding, however, should not be read to imply that a lawyer does not have any obligation to monitor a testator's activities with respect to his or her assets where the lawyer has actual knowledge of a subsequent transaction. Further, courts may be more inclined to impose a greater level of implied knowledge in situations where a law firm represents a client on an ongoing basis (*e.g.*, a high net-worth client who uses legal representation on a regular basis). In addition, courts in other jurisdictions could reach a result contrary to *Stangland*.

A lawyer who wishes to ensure he or she has no affirmative duty to monitor factual changes that may impact his or her client's estate plan (*e.g.*, changes in the composition of the client's family, dispositive desires, fiduciary appointment desires, nature and extent of assets, place of domicile, creditor situation) should memorialize in an engagement letter an understanding to that effect.

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