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Bury your exposure: malpractice claims and estate planning

By Jason E. Fellner and Allen Kuo

Barring a few exceptions, a rule in legal malpractice is that a nonclient cannot sue an attorney for malpractice based upon the absence of strict privity. This rule makes sense because attorneys owe no professional duty of care to nonclients. However, estate planning attorneys are an exception to this general rule. Since the state Supreme Court handed down *Lucas v. Hamm*, 56 Cal. 2d 583 (1961), which essentially stripped away the doctrine of strict privity for claims made against estate planning attorneys, there has been a dramatic increase in legal malpractice claims against those attorneys. Legal malpractice claims against estate planning attorneys now are approximately the third largest category of legal malpractice claims in California. The good news is that over the last several years, appellate courts have published decisions that limit the number of potential nonclient claimants that may assert malpractice claims against estate planning attorneys.

Duty to client prior to death

It should come as no surprise that an attorney owes a duty to his or her client. The standard of care for an estate planning attorney is that the attorney should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances. If a legal area requires expertise, which is generally the case for estate planning attorneys, he or she is held to a more rigorous standard. CACI Section 600; *Wright v. Williams*, 47 Cal. App. 3d 802, 809-10 (1975).

This enigmatic standard for liability leaves estate planning attorneys more susceptible to lawsuits. With an increasing number of lawsuits, especially as the baby boom generation retires and looks to transfer their wealth to successive generations, estate planning attorneys should anticipate the areas in which a client might raise alleged maladies and exercise greater caution. Specific causes of action include, but are not limited to: errors in drafting; errors in execution; errors of law; failure to accomplish testator's intent; failure to update an estate plan based on new laws or facts; failure to investigate heirs and assets; allowing execution when the testator lacks testamentary capacity; delay in implementation of an estate plan; negligent estate planning; and missed deadlines

Under the privity doctrine, attorneys are held directly liable to their clients and their client's estates for breaching this duty. *Fox v. Pollack*, 181 Cal. App. 3d 954, 960 (1986).

Duty to intended express beneficiaries after client's death

In California, as in other jurisdictions, the traditional rule was that an attorney could be held liable for professional negligence only to his or her own client. *Chang v. Lederman*, 172 Cal. App. 4th 67, 76 (2009). However, this rule of strict privity was rejected in a duo of cases involving testamentary instruments. *Lucas; Heyer v. Flaig*, 70 Cal. 2d 223 (1969). These two cases have extended the liability of an estate planning attorney to include third parties — specifically, the intended express beneficiary.

In *Lucas*, an attorney negligently drafted a will containing a residuary trust, which violated the rule against perpetuities and statutory restraints on alienation. After the death of the testator, the attorney advised the intended beneficiaries that the residual trust provision was invalid and the intended beneficiaries would be deprived of the entire amount to which they would have been entitled if the provision had been valid.

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The resulting dispute reached the Supreme Court, which extended the following principles from *Biakanja v. Irving*, 49 Cal. 2d 647 (1958), for consideration in determining whether an attorney can be held liable to a third-party nonclient: (1) the extent to which the transaction was intended to affect the plaintiff; (2) foreseeability of harm to plaintiff; (3) degree of certainty that plaintiff suffered injury; (4) closeness of the connection between defendant's conduct and the injury suffered; (5) moral blame; and (6) the policy of preventing future harm.

The court added an additional factor for consideration: "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." While the court recognized that liability would be large and unpredictable in amount, it concluded that a contrary conclusion would cause the innocent beneficiary to bear the loss. As such, the plaintiffs were allowed to proceed with their action.

In *Heyer*, the Supreme Court addressed a legal malpractice claim brought by the intended beneficiaries of a will. It was alleged that the testatrix told the attorney she wanted to leave her entire estate to her two daughters, and also told the attorney of her intended marriage. The attorney drafted a will, which the testatrix signed shortly before she married. The will did not provide for her husband, nor did it indicate the testatrix's intention not to provide for him. Upon her death, her husband claimed a portion of the estate as a post-testamentary spouse. The two daughters sued the attorney claiming that the attorney negligently failed (1) to advise the testatrix of the consequences of a post-testamentary marriage and (2) to include any provision in the will as to the intended marriage.

The *Heyer* court reaffirmed the principles adopted in *Lucas*, explaining that the basis for extending tort liability to an intended beneficiary in the absence of privity was a breach of duty owed directly to the beneficiary: "[w]hen an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with

the client's intended beneficiaries."

No duty to potential beneficiaries

In the half-century since *Lucas*, California courts have considered numerous variations of nonclient liability. However, courts have consistently refused to impose a duty upon an attorney toward the prospective potential beneficiary. *Hall v. Kalfayan*, 190 Cal. App. 4th 927. 934-36 (2010); *Radovich v. Locke-Paddon*, 35 Cal. App. 4th 946, 965-66 (1995).

In *Radovich*, the decedent had an estate plan that provided for trust income to her husband and her sister. The decedent, who had breast cancer, had met with the attorney to discuss drafting a new will under which her husband would receive 100 percent of the trust income. The attorney delivered a rough draft of the will for her review. She told the attorney she intended to talk with her sister before finalizing the new will, but died several weeks later *without executing* the new will. The prior will was admitted to probate. Her husband brought an action for legal malpractice against the attorney, claiming he was dilatory and negligent in preparing and failing to obtain the decedent's due execution of the draft will. The court held that the attorney had no duty towards the husband because he was merely a potential beneficiary.

Distinguishing its holding from *Lucas* and *Heyer*, the *Radovich* court emphasized that in those cases the will had been signed by the decedent. The same court that decided *Radovich* later held in *Osornio v. Weingarten*, 124 Cal. App. 4th 304 (2004), that an attorney owes a duty to the beneficiary based on the existence of an executed will. This distinction suggests that until a will has been executed, there is no duty owed to a third-party prospective beneficiary.

There are both practical and policy reasons for courts requiring more evidence of commitment than is furnished by a testator's direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind *after* a will is signed, there is significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents.

From a policy standpoint, courts are wary of the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent — the only person who can say what he or she intended — has died. Accordingly, courts, as a policy matter, insist on the clearest manifestation of commitment the circumstances will permit. Moreover, courts are not willing to extend an attorney's duty to a third party where doing so could compromise the attorney's primary duty of undivided loyalty to his client by creating an incentive for the attorney to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent. *Radovich* at 965; see also *Boranian v. Clark*, 123 Cal. App. 4th 1012, 1019 (2004).

The erosion of privity has left California estate planning attorneys with one more group of potential claimants to consider. The result leaves the door open for malpractice exposure to extend beyond their client's lifetime and to client's express beneficiaries. Given that California courts only find a duty to a nonclient express beneficiary when a testamentary instrument has been executed, it is best practice for an attorney to prepare testamentary instruments for their clients with an abundance of care by being precise in their practice and checking the background of their client's express beneficiaries in order to mitigate against potential malpractice claims.

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