Can an Attorney be Liable for Legal Malpractice to Someone that is not His or Her Client?

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"Who? Johnnie Prince? I don't know who that is. Oh, him. Yes, I drafted his mother's will, and yes I may have made some mistakes and the beneficiaries maybe did not get as much as they should have, but how can he sue me for legal malpractice? His mother was my client, not him."

Can Johnnie sue the attorney for legal malpractice? To establish a claim for legal malpractice, Johnnie would need to prove that the attorney owed him a duty of care, that the attorney breached that duty to him, and that the breach proximately caused his damages. But did the attorney owe a duty to Johnnie – a third-party that was not his client? This begs the question as to whether an attorney owes a duty to one who is not his client and thus can be liable for legal malpractice. Although there are limited exceptions – most often in the context of the drafting of a will, with a duty sometimes owed to beneficiaries of the will – generally the answer is no in Maryland, the District of Columbia, and Virginia. However, attorneys practicing in these jurisdictions should be aware of the limited situations in which an attorney might owe a duty of care to a non-client. The following survey puts the general rule and exception in perspective.

Maryland

Maryland has generally required strict privity in legal malpractice actions. An attorney generally owes a duty to his or her client only.[1] "[A] non-client third party, who may have some other type of contractual relationship with the attorney, ordinarily is unable to maintain a malpractice action as a matter of law because the attorney's professional obligations are only to the client."[2]

However, in *Flaherty v. Weinberg*, the Maryland Court of Appeals recognized a limited exception to the strict privity requirement based upon a third party beneficiary theory.[3] In *Flaherty*, the Flahertys entered into a contract of sale for the purchase of a home and secured a mortgage loan from the bank. The bank retained the defendant-attorney to represent it at settlement, whereas the Flahertys were not represented at settlement. At settlement, the attorney for the bank assured the Flahertys that they were purchasing the property as described in the contract of sale and that the dwelling and well were located on the property within the described boundary lines. Several years after closing, the Flahertys learned that the well was not on their property. The Flahterys sued the bank's attorney for negligence, negligent misrepresentation, among other things.[4]

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[1] *Blondell v. Littlepage*, 185 Md. App. 123, 137-38 (2009).
[2] *Id.* at 138.
[3] 303 Md. 116, 129-31 (1985).
[4] *Id.* at 132-33.

The trial court dismissed the action, holding that the attorney owed no duty to the Flahertys.[5] On appeal, the Court held that the Flahertys did not employ the attorney. Therefore, no duty was owed and the Flahertys could not maintain their negligence action.[6] The Court of Appeals, however, ruled that there was a question of fact with respect to the negligent misrepresentation claim. More specifically, it was a question of fact as to whether the Flahertys were intended to benefit directly from the attorney's services. Thus, if they were intended beneficiaries, the attorney was under a duty to ascertain the correct boundaries of the property and to properly advise the Flahertys. For this limited reason, the decision was reversed.[7]

In rendering its decision, the Court noted that Maryland courts began to relax the strict privity rule in 1972 when the Court of Appeals decided *Prescott v. Coppage*.[8] The Court also discussed the decisions in *Claggett v. Dacy*[9] and *Kirgan v. Parks*,[10] both of which found that the third-party could not maintain an action against an attorney who was not theirs.

Subsequent to *Flaherty*, testamentary beneficiaries brought a professional malpractice action against the attorney that drafted the testators' will in *Noble v. Bruce*.[11] The Court of Special Appeals held that the rule of strict privity applied and precluded the malpractice action.[12] The Court reasoned that the beneficiary of a will is not necessarily the beneficiary of the attorney-client relationship.[13] In this case, the relationship was intended to benefit the testators, and not the beneficiaries. Thus, the limited third-party beneficiary exception to the strict privity rule did not apply.[14]

The District of Columbia

Similarly, the District of Columbia applies the strict privity rule with the limited third-party beneficiary exception. "[T]he the obligation of an attorney is to his client, and not to a third-party."[15] The D.C. Court of Appeals has held that exception to the strict privity rule is where the plaintiffs were the "the direct and intended beneficiaries of the contracted for services."[16]

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[5] 303 Md. at 133.
[6] *Id.* at 134.
[7] *Id.* at 139.
[8] 303 Md. at 129 (citing *Prescott v. Coppage*, 266 Md. 562 (1972)) (holding that a creditor-third party beneficiary of receivership could sue to recover losses caused by attorney for a receiver of a savings and loan association).
[9] 47 Md. App. 23 (1980) (holding that bidders at a foreclosure sale could not maintain an action against attorneys for seller because they were neither the client nor the intended beneficiaries; for one to be a third-party beneficiary, the person must be "part of the class of persons specifically intended to be the beneficiary of the attorney's undertaking.").
[10] 60 Md. App. 1 (1984) (holding that beneficiary of a will could not maintain an action against the drafting attorney in that instance, but cautioned that it is "a definite maybe" whether a testamentary beneficiary has standing to sue the attorney who drafted the testator's will.).
[11] 349 Md. 730 (1997).
[12] *Id.* at 759.
[13] *Id.* at 754.
[14] *Id.*
[15] *Scott v. Burgin*, 97 A.3d 564, 566 (D.C. 2004) (quoting *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1992)).
[16] *Needham*, 459 A.2d at 1062.

In the seminal case, *Needham v. Hamilton*, Needham filed a legal malpractice suits against attorneys based upon their admitted negligence in the drafting of a will, which resulted in him being denied the intended take of the estate. The trial court ruled that because Needham did not contract the attorneys to draft the will, his lack of privity barred the action.[17] The Court of Appeals, however, reversed, and held that intended beneficiaries of a will could bring a legal malpractice action against drafting attorneys of a will despite the lack of privity.[18] Similarly, in *Teasdale v. Allen*, intended beneficiaries of a will had standing to bring a legal malpractice action without regard as to whether their precise status as beneficiaries could be discerned from the four corners of the will.[19] However, in *Hopkins v. Atkins*, the beneficiary of an estate could not sue the attorney for the estate's personal representative because, unlike *Needham*, the beneficiary was not named in the will and thus he was not a direct and intended beneficiary.[20]

Recently, in *Scott v. Burgin*, a divorce attorney was sued for malpractice by a deceased client's fiancee. The fiancee of the client alleged that the attorney negligently failed to secure a divorce from the to-be ex-wife, before the client died. The fiancee was one who secured the attorney's services for her fiancee, attended many of the meetings, and had a number of communications with the attorney.[21] However, relying on *Needham* and *Hopkins*, the Court of Appeals held that the fiancee, despite her relationship with the client and the attorney, could not maintain the legal malpractice action. The fiancee was not the direct and intended beneficiary of the divorce transaction.[22]

Virginia

Virginia employs an even stricter approach than Maryland and the District. In Virginia, no cause of action exists absent privity of contract.[23] Although the instances are rare, "to proceed on [a] third-party beneficiary contract theory, the party claiming the benefit must show that the parties to the contract *clearly and definitely intended* to confer a benefit upon him."[24] In *Copenhaver*, the plaintiffs sued their grandmother's attorney for negligently preparing her will. The plaintiffs argued that they were intended beneficiaries of their grandmother's contract with the attorney.[25]

The Supreme Court of Virginia rejected the plaintiffs' contention, holding that their grandmother did not enter into the contract with the attorney with the "intent of conferring a direct benefit" upon them.[26] The Court, however, provided an example in which the third-party beneficiary exception might apply – if the client advised the lawyer that "*his one overriding intent*" is to ensure that each of his grandchildren receive a certain sum at his death, "and that unless the lawyer agrees to take all steps necessary to ensure that each of his grandchildren

[17] *Id.* at 1061.
[18] *Id.* at 1062.
[19] 520 A.2d 295 (D.C. 1986).
[20] 637 A.2d 424, 428-29 (D.C. 1993).
[21] *Scott*, 97 A.3d at 564-65.
[22] *Id.* at 566-67.
[23] *Copenhaver v. Rogers*, 238 Va. 361, 366 (1989).
[24] *Id.* at 367 (emphasis added).
[25] *Id.* at 365-66.
[26] *Id.* at 367.

receives the specified amount, the client will take his legal business elsewhere."[27] In other words, although the beneficiary need not be named in the contract for services, the intent to benefit the third party must be clear and explicit.

Similarly, in *Johnson v. Hart*, the Court held that a testamentary beneficiary could not maintain the estate's legal malpractice action in the beneficiary's own name. The attorney was retained to represent the estate, not the beneficiary, and there was no clear intent to confer a direct benefit on the beneficiary.[28]

Recently, in January 2015, the Richmond City Circuit Court held that an attorney was liable for legal malpractice to a third-party beneficiary of a will, the Richmond Society for the Prevention of Cruelty to Animals ("RSPCA").[29] The RSPCA argued that the attorney prepared a will for Alice L. Cralle Dumville and the attorney entered into an oral contract where he agreed to draft the will so that the will would leave all of Dumville's property to her mother and, if her mother predeceased her, then the property would go to the RSPCA. The mother predeceased Dumville.

The will as drafted, did not leave all of the property to the RSPCA and the RSPCA sued for legal malpractice. The attorney argued that the RSPCA was not an intended beneficiary because there was no "instrument" stating as such, and because the RSPCA stood behind the mother. The Court concluded that the RSCPA demonstrated Dumville's clear intent that she wanted everything to go to them if her mother predeceased her and that the RSPCA met Virginia's stringent test for a third party to have standing. Accordingly, the RSCPA was an intended beneficiary of the will. The attorney has noticed an appeal.

Summary

The foregoing cases in the three local jurisdictions (although there are some nuances among the three jurisdictions, especially in Virginia with a higher showing required) make clear that an attorney does not owe a duty to a non-client unless it is apparent that the attorney was retained by the client for the purpose of conferring a benefit on an identified or known third-party. Often, the intended benefit must be clear from the face of the retainer agreement or the document(s) related to the work performed. For example, the intended beneficiary must be specifically identified in the retainer agreement, the will itself, or the transactional documents involved in the undertaking.

Thus, in the attorney's case with Johnnie, the attorney's potential liability for a legal malpractice claim may depend upon whether Johnnie was identified by name in the will or whether client expressed (even orally) a desire that the will was to be drafted for the benefit of Johnnie. If either occurred, the attorney may owe a duty to Johnnie. If Johnnie was not specifically identified or no such desire was expressed, then Johnnie likely would not prevail on

[27] *Id.* at 369 (emphasis added).
[28] 279 Va. 617, 625-26 (2010).
[29] *Richmond Society for the Prevention of Cruelty to Animals v. Thorsen,* Case No. CL11001864-00, Richmond City Circuit Court.

his legal malpractice claim. However, because intent is often a question of fact, the attorney will likely not prevail on summary judgment and may have to endure a trial before prevailing.

In light of the dilemma of having to endure a trial before winning, and as a practice pointer, to prevail on summary judgment or to preclude a lawsuit from the start, it may be advisable for attorneys to explicitly state in their retainer agreement with the client that the work is not being performed for the benefit of anyone other than the client or the party to the agreement.