

PROFESSIONAL LIABILITY UPDATE

July 3, 2002

Issue No. 123

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Chip Cox

Edward F. Donohue, III

Kathleen M. Ewins

Kathleen A. Foley

Bruce N. Furukawa

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

William L. Jacobson

Farand C. Kan

Anna Kapetanakos

Joseph P. McMonigle

Douglas J. Melton

Robin M. Pearson

Jessica B. Rudin

Richard J. Sciaroni

Steven Sharafian

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

DUTY

California Law

By Jennifer A. Becker

*The California Supreme Court has accepted a case that held an attorney representing an administrator of an estate owes no duty to a successor executor.*

***Borissoff v. Taylor* 02 C.D.O.S 1734 (rev. granted 5/15/02)**

When Veronica Smith died she left two competing wills. The court appointed Mr. Springer as special administrator. He engaged Taylor & Faust to represent him and they prepared an allegedly improper estate tax return. In the course of the representation, Springer consulted Taylor & Faust about his own embezzlement from the estate. Taylor & Faust resigned as Springer's counsel, and Springer died several months later. The deadline to correct the estate tax return passed without action.

Several years later Borissoff was appointed executor of the estate. He filed an action against Taylor & Faust that the trial court dismissed based on his lack of standing.

The Court of Appeal agreed. The administrator of an estate represents the administrator, not the estate. He has no contractual privity with the beneficiaries of the estate or a successor fiduciary. The estate itself is not a legal entity capable of being a client.

The court was not persuaded by the

601 Montgomery Street, Suite 900  
San Francisco, California 94111  
Telephone (415) 397-2222  
Facsimile (415) 397-6392  
www.longlevit.com

argument that third parties were expected to benefit from the attorney's services. It is common in modern practice that third parties are benefited, or are damaged, by an attorney's actions. This is insufficient to impose a duty on the attorney towards those parties.

The court found that imposing on attorneys for estate administrators and executors a simultaneous duty toward the fiduciaries and the beneficiaries of the estate could create irreconcilable conflicts of interest, as often the interests of the various beneficiaries conflict. The same is true if, as in the *Borissoff* case, successor estate fiduciaries claimed the duties owed to the predecessor fiduciary. The conflict is amply demonstrated by the fact that Springer consulted with Taylor & Faust about his own embezzlement from the estate.

The Probate Code provision that invests a successor estate fiduciary with the same powers to benefit the estate as her predecessor fiduciary did not change the equation. A malpractice case is not necessarily "for the benefit of the

3130 Wilshire Boulevard, 2nd Floor  
Santa Monica, California 90403-2300  
Telephone (310) 829-0977  
Facsimile (310) 829-0991  
www.longlevit.com

estate.” Prior case law established that an attorney for an estate fiduciary could not be surcharged for losses caused by the fiduciary. By the same token, a direct malpractice action against the attorney is not authorized.

Estate administrators possess broad authorities and also broad, non-delegable duties. This is the reason they are bonded. The administrator cannot avoid surcharge by claiming that her attorneys were negligent, unless the attorney herself embezzles from the estate through no fault of the administrator. The effective remedy for the estate in the case of negligent or dishonest administrators is to surcharge the administrator by objecting to estate accountings. A successor administrator may seek to surcharge the predecessor. If direct actions against the administrator’s attorneys were also permitted, attorneys would have to be bonded increasing estate administration expenses.

The court noted that Borissoff sought to surcharge Springer’s estate for the embezzlement, and that he should have sought to surcharge the estate for the tax losses as well.

*Comment:* It is anticipated that by accepting review the Supreme Court will provide additional guidance concerning an attorney’s duties to third parties.