

PROFESSIONAL LIABILITY UPDATE

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Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim Dincel

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

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Joseph P. McMonigle

Douglas J. Melton

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Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

ATTORNEY-CLIENT RELATIONSHIP

California Law

By Jennifer A. Becker

The First Appellate District holds that an attorney has no duty to beneficiaries under a will to ascertain the testamentary capacity of a client seeking to amend an estate plan.

Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray (2003) 109 Cal. App. 4th 1287

The children of Clyde Smith sued Robert Disharoon and his law firm for malpractice in connection with Disharoon's preparation of amendments to their father's estate plans. The Smith family claimed Disharoon should have known their father lacked testamentary capacity when he executed the amendments. The trial court sustained Disharoon's demurrer without leave to amend because an attorney owes no duty of care to non-clients to determine whether the testator-client possesses testamentary capacity.

The Court of Appeal affirmed, noting that the general rule is that an attorney has no professional obligation to non-clients and cannot be held liable to non-clients for the consequences of professional negligence. As an exception to this general rule, it has been settled in California that an attorney may be liable to non-clients in limited circumstances where the non-client was the intended beneficiary of the attorney's services.

A determination of whether liability exists in a specific case is a matter of policy and involves the balancing of various factors, including: 1) the extent to which the transaction was intended to affect the non-client; 2) the foreseeability of harm to the non-client; 3) the degree of certainty that the non-client suffered injury; 4) the closeness of the connection between the attorney's conduct and the injury suffered; 5) the moral blame attached to the attorney's conduct; and 6) the policy of preventing future harm; 7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client; and 8) whether the imposition of liability "would impose an undue burden on the profession."

The court found that imposing a duty to beneficiaries to determine the testator's testamentary capacity could compromise the attorney's duty of loyalty to the client. The duty of loyalty requires that an attorney protect the client in every possible way. It is a violation of that duty for the attorney to assume a

position adverse or antagonistic to the client without the client's free and intelligent consent.

In cases involving an invalidly drafted or executed will, the document itself demonstrates the intention of the testator to benefit the recipient of the estate plan. Thus there is no potential for conflict between the duty the attorney owes to the client and the duty the attorney owes to intended beneficiaries. However where the testamentary capacity of the testator is the basis for a will challenge, the true intent of the testator is the central question. The attorney who drafts a testamentary document after ascertaining the client's testamentary capacity by his or her own observations and experience fulfills the duty of loyalty to the testator. The attorney should not be required to consider the effect of the new will on the beneficiaries of a former will or the new will. The attorney would be subject to potentially conflicting duties to the client and to competing sets of potential beneficiaries. There would be potential liability to either the disinherited beneficiaries if the attorney prepares the will, or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's wishes.

The court rejected the Plaintiffs' claim that the established duty to ascertain testamentary capacity renders the burden on the attorney ephemeral. Ascertaining testamentary capacity is often difficult and the potential for liability to beneficiaries who might deem any investigation inadequate would unjustifiably deny many persons the opportunity to make or amend their wills. In addition, beneficiaries disinherited by a will executed by an incompetent testator have a remedy; they may contest the probate and challenge

the will on the ground that the testator lacked testamentary capacity.

A practical reason for refusing to extend the duty is that disputes will not arise until the testator has died, making defense of the claims difficult. Policy reasons include that the foreseeability of harm, the degree of certainty that beneficiaries suffered injury, and the closeness of the connection between the attorney's conduct and the alleged injury are all less than in defective will cases.

The court noted that the Restatement Third of Law Governing Lawyers limits a duty of care to third parties to situations where the lawyer knows that a client intends that the services benefit a non-client and the imposition of a duty would not significantly impair the lawyer's performance of obligations to the client. The Restatement acknowledged that lawyers' services regularly affect non-clients. In situations where the specific object of the representation is to benefit a specific non-client, allowing the non-client to recover for breach promotes the attorney's loyal and effective pursuit of client objectives. In the absence of a specific intent to benefit the non-client, enforcement of a duty to a non-client could actually hinder an attorney from following client instructions adverse to the non-client.

The court disagreed that an attorney's duty to determine testamentary capacity as embodied in the Model Rules of Professional Conduct and various California practice guides imposed duties to non-client beneficiaries. California law, informed by the Restatement and the law of other states, recognizes the problems in imposing a duty upon counsel to assess the capacity of the testator. No authority indicates that such a duty would run to

beneficiaries rather than solely to the testator. The court concluded that while it may be prudent to refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity in a borderline case, that is a far cry from imposing malpractice liability to non-client potential beneficiaries.

Comment: This case on attorney liability to non-clients informs the eight part-balancing test. Where obligations to non-clients could conflict with the attorney's ability to comply with client objectives, no duty is imposed.