

# The Burgeoning Scope of Third-Party Legal Malpractice Liability in Ohio



By David J. Oberly

**M**alpractice. The term strikes paralyzing fear in the hearts of legal professionals maybe more than any other word in the English language. Traditionally, attorneys' obligations extended only to providing competent representation to their clients. As a result, attorneys' potential legal exposure to malpractice claims was limited to those clients with whom the attorney maintained contractual privity. Over time, however, the courts' liberal willingness to extend attorneys' duties to third parties falling outside of, and unprotected by, the attorney-client relationship has resulted in a significant erosion of the traditional umbrella of protection represented by conventional attorney immunity from third-party claims. In recent years, courts have not only carved out several exceptions to attorney immunity, but they have also broadened the scope of those exceptions as well. Consequently, third-party claims represent one of the fastest growing types of malpractice lawsuits filed against legal professionals today, resulting in significantly enhanced malpractice exposure and liability for attorneys of all shapes and sizes.

## Ohio Law

Attorneys in Ohio enjoy qualified immunity from liability to third parties arising out of the representation of a client. This immunity ordinarily shields attorneys from liability to third parties stemming from the good-faith performance of legal services on behalf of a client. Importantly, only two circumstances exist whereby a third party can successfully sidestep a legal profession-

al's traditional immunity from suit by non-clients: (1) where the third party is in privity with the client for whom the legal services were performed and (2) where the attorney acts with malice.

The first exception to attorney immunity from third-party claims pertains to those in "privity" with the actual client of the attorney. When someone other than an attorney's client seeks to sue the attorney for professional negligence, the strict privity rule requires the third party to demonstrate privity with the attorney's client in order to properly assert a legal malpractice claim. In this context, privity is defined as the connection or relationship between two parties, each having a legally recognized interest in the same subject matter. Significantly, the privity exception is construed narrowly by the courts when there is no attorney-client relationship in a legal malpractice action. To be in privity, a claimant would have to show that his and the client's interests were the same, such that representing the client is equivalent to representing the party alleging privity with the client.

The second exception pertains to malicious conduct. For purposes of a non-client's standing to bring a malpractice action against an attorney, an attorney acts maliciously when special circumstances such as fraud, bad faith, or collusion are present. "Malice" is defined as: (1) that state of mind which a person's conduct is characterized by hatred, ill will or a spirit of revenge; or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. The contours of the malice exception for attorney immunity to third party claims are not brightly drawn. In this regard, there is scant

Ohio case law identifying what set of facts is necessary to constitute malice as a substitute for an attorney-client relationship. At least one Ohio court has cautioned that malice, as a surrogate for an attorney-client relationship, cannot be predicated on actions taken by the attorney which the attorney is permitted to engage in, even if undertaken in a negligent fashion, as part of the representation of a client. Rather, to constitute malice, the actions of the attorney must ordinarily include a disregard for rights which the attorney (not the client) is required to protect, and must include harm beyond that which legal action necessarily may inflict.

### Applications of the Privity and Malice Exceptions

The scope and breadth of third-party liability for legal malpractice has widened significantly in recent years. During this period, Ohio courts have greatly extended the contours of the two primary exceptions to traditional attorney immunity pertaining to malpractice actions filed by non-clients.

For example, in *Patel v. Zervas*, No. 2:13CV499, 2013 U.S. Dist. Lexis 173406, 2013 WL 6504695 (S.D. Ohio Dec. 10, 2013), the United States District Court for the Southern District of Ohio, applying Ohio law, diverged significantly from the traditional viewpoint held by Ohio courts that the malice exception to third-party liability does not extend to mere negligence in the representation of a client, holding instead that the malice exception applied to provide a third party with standing to bring a malpractice action against an attorney where the non-client's claim was founded solely on allegations of negligence against the legal professional. In that case, Pritika Patel, the administrator of the estate of Rumanbhai Patel, filed an action under Ohio law for legal malpractice stemming from an attorney's failure to prosecute Rumanbhai's breach of contract lawsuit and for the negligent handling of a legal matter. In seeking dismissal of the action,

the attorney argued that the nature of Pritika's action was insufficient to satisfy the malice exception for purposes of third-party standing to bring a malpractice claim, as Pritika only asserted her claim against the attorney based on a theory of negligence. The court disagreed, finding that the nature of Pritika's claim was

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still nonetheless sufficient to trigger the malice exception. In doing so, the court noted that the plaintiff alleged that the attorney failed to prosecute his client's breach of contract action for more than a year, failed to respond to motions to dismiss, was given a show cause order for failure to appear, failed to appear at a hearing on a motion to dismiss or a status conference, and failed to make an attempt to present evidence to support setting aside the judgment of the trial court under Civil Rule 60(B) following the dismissal of the action without prejudice. Combined, the court found these allegations were together sufficient to raise an inference of actual malice for purposes of the third-party claimant's legal malpractice claim.

The privity exception to attorney immunity from third-party liability has also undergone a robust expansion in recent years. For example, in *Arpadi v. First MSP-Corp.*, 68 Ohio St.3d 453, 454, 628 N.E.2d 1335 (1994), the Ohio Supreme Court expanded the scope of the privity exception to the limited partners of a partnership. With that said, Ohio courts applying the *Arpadi* decision have refused to extend the fiduciary relationship to minority shareholders in a corporation. *Omega Riggers & Erectors, Inc. v. Koverman*, 2016-Ohio-2961 (2d Dist.).

In addition, the privity exception has also been broadened to a considerable degree in the area of estate planning. Importantly, in *Elam v. Hyatt Legal Services*, 44 Ohio St.3d 175, 541 N.E.2d 616 (1989), the Ohio Supreme Court extended the reach of the privity exception to include the vested beneficiaries of an estate. In doing so, the court held a beneficia-

ry whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists, the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance. With that said, Ohio courts have found privity lacking where the beneficiary holds only

a potential interest at the time the alleged malpractice occurred. For example, in *Simon v. Zipperstein*, 32 Ohio St.3d 494,

748 N.E.2d 636 (1987), the Ohio Supreme Court held that an intended beneficiary under a will did not have standing to sue the attorney because the beneficiary was not in privity with the testator, the attorney's client, since the plaintiff—as a potential beneficiary of the father's estate—had no vested interest in the estate.

As such, at the present time, the privity substitute for an attorney-client relationship has been extended in the context of estate planning only to undeniably-vested beneficiaries of an estate, but not to potential beneficiaries. However, Ohio courts have signaled a heightened potential for another expansion of the privity concept down the road to provide intended or potential beneficiaries of a will or trust with a remedy for damages suffered at the hands of an attorney who negligently drafted estate documents.

### The Final Word

The rapid expansion of third-party liability in legal malpractice litigation is a significant cause for concern for Ohio attorneys. Today, an attorney's obligations no longer extend only to his or her client. Rather, attorneys' duties have been significantly enhanced to now encompass a wide array of individuals who may have been impacted by attorney's work as well. As a result, the level of potential malpractice exposure faced by attorneys has greatly increased as compared to years past. To make matters worse, the trend toward increased third-party liability is only set to continue, if not accelerate, moving forward. Unfortunately, it is only a matter of time before Ohio courts decide to further expand the scope of third-party legal

malpractice liability beyond its current parameters.

As a result, attorneys must take great care to guard against the potential pitfalls of falling victim to this burgeoning type of legal malpractice claim. In order to minimize the risk of potential third-party liability, attorneys must anticipate potential duties owed by them not only to their clients themselves, but also those with whom the attorney does not maintain a traditional attorney-client relationship as well. Accordingly, attorneys should take the time to evaluate the representation of each individual client to identify any potential third parties who may be owed a duty in connection with the representation of the client, as well any other individuals or entities who may seek recourse in connection with the negative impact that the representation may have on them. Once all third parties are identified, attorneys should endeavor to take all reasonable measures to avoid the potential for exposure to third-party claims arising from these potentially problematic individuals and organizations.

Regardless of the type of legal matter, at the outset of any engagement, the attorney should clearly delineate who is and who is not the client. In addition, attorneys should meticulously establish the client's expectations, objectives, goals of the engagement, as well as the specific scope of the representation and the legal services the attorney will provide, including any limitations thereto. These key details should then be articulated to the client in writing by way of a written engagement letter. Moreover, attorneys and their firms should implement effective policies and procedures to identify and rectify any potential conflicts of interest that may arise in connection with the representation of a particular client. If an attorney happens to deal with a non-client during the course of an engagement, the legal professional should utilize a written disclaimer specifying that the attorney does not represent the third party, and that the non-client maintains the ability to obtain personal counsel of his or her own choosing. Finally, attorneys must also employ proper document retention

policies and procedures, as the client's physical file must be accessible in the event that a third-party claim is pursued sometime later down the road. While it is impossible to completely extinguish all possibility of third-party liability exposure, through the implementation of these and other proactive measures, attorneys can significantly diminish and limit the likelihood of finding themselves on the receiving end of a third-party malpractice claim.

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