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# 3 Attorney Liability to Non-Clients

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# I. [3.1] INTRODUCTION

The January 22, 2002, headline on the Marketplace section of the Wall Street Journal read: *"Battle of Wills: Should Disappointed Heirs Get to Sue Estate Lawyer?"* The article quoted Professor Stanley Johanson of the University of Texas School of Law in Austin as saying that allowing disappointed beneficiaries to sue — often decades after a will is written — creates an "open ended Pandora's box of potential liability" for the attorney who drafts the will. Wall St.J., Jan. 22, 2002, at B-1.

While the concept of non-clients suing lawyers might have been news to the Wall Street Journal in 2002, it certainly has been practiced for decades and appears at the present to be expanding rather than contracting. The present trend of extending attorney liability to non-clients would be worrisome but for the fact that Illinois courts at least seem inclined to be very literal in their application of the six-year legal malpractice statute of repose.

# II. COMMON-LAW LIABILITY TO NON-CLIENTS

## A. [3.2] The Historical Debate

In *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng.Rep. 402 (1842), privity was identified as one of the essential elements of any action brought in tort for economic loss. In the United States, *Winterbottom* was heavily relied on by the U.S. Supreme Court in *Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1879), which was an action brought by a bank against an attorney who had prepared a title report on which the bank relied in making a real estate loan. The U.S. Supreme Court held that an attorney is liable solely to his or her client for negligence that results in economic loss. In dictum, the Court opined that if the action were premised in fraud, then the non-client would be allowed to proceed.

Thus, for many decades attorneys were sheltered from non-client lawsuits by the doctrine of privity. In the 1920s and the 1930s, however, the courts of New York were beginning to formulate a near-privity doctrine that was ultimately stated with clarity in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). Almost all of these cases involved accounting errors. The court in *Credit Alliance* announced three criteria for imposing liability on an accountant for negligently providing inaccurate information:

1. an awareness by the maker of the statement that the statement is to be used for a particular purpose;

2. reliance by a known party on the statement in furtherance of that purpose; and

3. some conduct by the maker of the statement linking the maker to the relying party and demonstrating its understanding of that reliance. 483 N.E.2d at 118.

In *Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992), the near-privity doctrine was applied for the first time to attorney defendants in a legal malpractice action.

As the near-privity doctrine beat down the privity bar, more courts were willing to take the final step and apply negligence theories in actions brought by non-clients against lawyers. In *Biakanja v. Irving,* 49 Cal.2d 647, 320 P.2d 16 (1958), the California Supreme Court allowed Mr. Biakanja to sue a notary public for negligently drafting a will. The *Biakanja* court formulated what became known as the "balance-of-factors test." The balance-of-factors test was first employed in a legal malpractice action in *Lucas v. Hamm,* 56 Cal.2d 583, 364 P.2d 685, 15 Cal.Rptr. 821 (1961). The *Lucas* court found that (1) the purpose of the will in question was to benefit the plaintiff beneficiaries, (2) the harm to the beneficiaries was foreseeable and certain, and (3) the only way to prevent future harm would be to give the beneficiaries a cause of action. *Lucas* included an additional factor — whether allowing the cause of action would pose an undue burden on the defendant's profession. Justice Gibson will always be fondly remembered for his discourse in *Lucas* on why no attorney could ever be negligent for a violation of the rule against perpetuities because it was just too difficult for the average lawyer to understand. This case also coined the following phrase:

> **The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.** 364 P.2d at 689.

The California Supreme Court stated in *Smith v. Lewis,* 13 Cal.3d 349, 530 P.2d 589, 595, 118 Cal.Rptr. 621 (1975), that it was correct to instruct the jury that

> **an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [364 P.2d 685, 689, 15 Cal.Rptr. 821]; *Lally v. Kuster* (1918) 177 Cal. 783, 786 [171 P. 961]; *Floro v. Lawton* (1960) 187 Cal.App.2d 657, 673 [10 Cal.Rptr. 98]; *Sprague v. Morgan* (1960) . . . 185 Cal.App.2d 519, 523; *Armstrong v. Adams* (1929) 102 Cal.App. 677, 684 [283 P. 871]).**

In *Smith,* the court held that even with respect to an unsettled area of the law, an attorney assumes an obligation to his or her client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem.

The court in *Lucas, supra,* found no liability for a violation of the rule against perpetuities because it was just too difficult for the average lawyer to understand. *Smith,* however, makes it clear that under California law, *Lucas* is going to be an aberration and lawyers are going to be responsible for understanding just about every other aspect of California law.

In *Osornio v. Weingarten,* 124 Cal.App.4th 304, 21 Cal.Rptr.3d 246 (2004), the Sixth Appellate District of California held that an attorney drafting instruments to transfer property to a presumptively disqualified person owed a duty of care to advise as to the likelihood of presumptive disqualification and to recommend that the client seek independent counsel. In *Osornio,* the court applied the six-prong *Lucas* test (see §3.3 below) and decided that intended beneficiaries of a will who lose their testamentary rights because of a failure of the attorney who drew the will to properly fulfill his or her obligations under the contract with the testator may recover as third-party beneficiaries.

In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.,* 109 Cal.App.4th 1287, 135 Cal.Rptr.2d 888 (2003), the First Appellate District of California applied the six-prong *Lucas* test to beneficiaries of an estate who alleged that the attorneys were negligent in preparing amendments to the estate plan of the beneficiaries' father at a time when the father lacked testamentary capacity. The court of appeals added to the *Lucas* criteria two additional factors: the likelihood that imposition of liability might interfere with the attorneys' ethical duties to the client, and whether the imposition of liability would impose an undue burden on the legal profession. In *Moore,* the California court of appeals therefore included the one criterion (conflict of interest) that the Illinois Supreme Court found most compelling in *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982).

### B. [3.3] The Rise of the Third-Party Beneficiary

While the majority of jurisdictions employ the balance-of-factors test (see §3.2 above) to allow non-clients to bring negligence actions against attorneys, Illinois has adhered to a minority position that is based on the third-party beneficiary concept.

In *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982), the children of a divorced wife sued their mother's attorney for failing to secure for them the benefits of their father's life insurance policies, under which they were required to be maintained as the prime beneficiaries by the divorce decree. At the trial level, the court held that the contract between the plaintiffs' mother and the defendant attorney was not entered into for the direct benefit of the children of that marriage.

The Illinois Supreme Court deemed it best to require non-client plaintiffs to allege and prove facts that would identify them as third-party intended beneficiaries of the attorney-client relationship in order to recover in tort. The Illinois Supreme Court felt that this, in some part, limited the scope of the duty owed by an attorney to non-clients. 440 N.E.2d at 100 – 101. The court found that the requisite intent of the children to benefit primarily and directly from the attorney-client relationship was lacking. The court felt that the wife had hired the attorney primarily to obtain a divorce property settlement and to procure custody of her children. Further, the court found that it really was not the mother's primary intent to further her children's interests and held that there was an inherent conflict between the mother's interest and the children's interests. The court apparently felt that the spouses did not engage in dissolution to benefit their children. The primary if not sole intent of dissolution is to rid oneself of an undesirable spouse even though that usually has some negative implications for the children of that marriage. The court did not say that parents and children are adversarial in dissolution but simply recognized

that there is an unavoidable conflict of interest. However, one wonders how the *Pelham* court would have dealt with the question of intended beneficiary if there had been evidence in the record that the dissolution petitioner was primarily interested in protecting the children of that marriage from a dangerous spouse.

Even if one entertains for the sake of argument the premise that the mother in *Pelham* sought the divorce primarily to benefit her children, even that cannot override the policy that a duty to a non-client should never be implied or inferred when the existence of such a duty would create a conflict of interest. In *Pelham,* the court stated:

> **Where a client's interest is involved in a proceeding that is adversarial in nature, the existence of a duty of the attorney to another person would interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client. . . . In cases of an adversarial nature, in order to create a duty on the part of the attorney to one other than a client, there must be a clear indication that the representation by the attorney is intended to directly confer a benefit upon the third party. [**Citation omitted.**]** 440 N.E.2d at 100.

Consider the situation in which a lawyer is asked to prepare a will intending to benefit a third party, *i.e.,* a beneficiary of the will. The lawyer may be held to owe a duty to that beneficiary. However, if later the lawyer is asked by the same testator to redraft or amend the will to disinherit the aforesaid beneficiary, the relationship between the testator and the former beneficiary has turned adversarial, thereby negating any duty owed by the drafter of the will to the disinherited ex-beneficiary.

From the time of *Pelham* to the present, Illinois has remained a third-party beneficiary jurisdiction when non-clients seek to recover from lawyers.

The most common non-client liability scenario in all jurisdictions is the "will gone wrong." The war between legal drafters, legatees, and heirs rages on today, one salient example being the estate of tobacco heiress Doris Duke, filed in Superior Court in Los Angeles against the firm of Katten Muchin & Zavis. *Battle of Wills: Should Disappointed Heirs Get to Sue Estate Lawyer?,* Wall St.J., Jan. 22, 2002, at B-1.

In *McLane v. Russell,* 131 Ill.2d 509, 546 N.E.2d 499, 137 Ill.Dec. 554 (1989), the Illinois Supreme Court made good on its implied promise in *Pelham* to find a direct, intended benefit. In *McLane,* the cousins of the mentally incompetent survivor of two spinster sisters took advantage of a joint tenancy interest in farmland to frustrate the intent of the predeceased sister and her incompetent survivor to leave their farmland to the tenant farmers who had sharecropped that land for them for two generations. The tenant farmers persuaded the jury that the drafter of the will had failed to achieve the intended effect of the two sisters and that the cousins of the surviving sister could not defeat their claim to the land that would have passed directly to them had the drafter of the will thought to sever the preexisting joint tenancy by which the two sisters held title to the 280-acre farm.

An important question to address is "Who is the beneficiary of the representation?" In *Schechter v. Blank,* 254 Ill.App.3d 560, 627 N.E.2d 106, 193 Ill.Dec. 947 (1st Dist. 1993), and *York v. Stiefel,* 99 Ill.2d 312, 458 N.E.2d 488, 76 Ill.Dec. 88 (1983), the six-part balancing test from *Lucas v. Hamm,* 56 Cal.2d 583, 364 P.2d 685 (1961), was adopted to determine when a duty of care is owed to a non-client. In *Lucas,* the California Supreme Court set out the five-part balancing test in the following terms, adding a sixth element:

1. the extent to which the transaction was intended to affect the third party;

2. the foreseeability of harm to the third party;

3. the degree of certainty that the third party suffered injuries;

4. the closeness of the connection between the defendant's conduct and the injury;

5. the policy of preventing future harm; and

6. whether recognition of liability under the circumstances would impose an undue burden on the profession. 364 P.2d at 687 – 688.

The six factors identified in *Lucas* are not evenly weighted. By far the most decisive issue is whether the defendant attorney was retained to provide legal services for the benefit of the third party. *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville,* 261 Ill.App.3d 750, 633 N.E.2d 1267, 199 Ill.Dec. 276 (5th Dist.), *appeal denied,* 157 Ill.2d 503 (1994).

This is not an inquiry into one mind. The question completely stated is "Did both the lawyer and client intend the third party to be the beneficiary of the lawyer's efforts?" *See Pelham, supra.* Whether both the lawyer and the client intended a third party to benefit from the lawyer's services is not a legal issue to be resolved as a matter of law by a judge; rather, it is a factual issue to be decided by the trier of fact. *See Jewish Hospital, supra.*

The intent of the third party is not weighed in the scales of justice. The scope of the undertaking as defined by the attorney and the client controls. *Pelham, supra.*

*Schechter, supra,* illustrates that a potential conflict of interest with a third party, which carries the possibility of divided loyalty, negates any inference of an intent to benefit that third party. In *Schechter,* trustees in bankruptcy, who essentially represented the bankrupt's creditors, sued the bankrupt's attorney for malpractice, alleging that a better result would have obtained for the trustees if Chapter 11 had been elected instead of Chapter 7.

In *Credit General Insurance Co. v. Midwest Indemnity Corp.,* 872 F.Supp. 523 (N.D.Ill. 1995), the U.S. District Court for Northern District of Illinois employed the foreseeability test from the *Lucas* six-fold formula. Midwest had executed a contract with Credit General that included indemnification of Credit General by Midwest for any losses arising out of Midwest's underwriting and issuance of bonds on behalf of Credit General. A so-called fronting agreement

provided that other insurers could issue bonds for Credit General. Credit General hired the defendant law firm to defend Indiana Lumbermens Mutual Insurance Company on one such bond. When the case was lost, the client sought indemnity from Midwest. Midwest then filed a legal malpractice claim against the defense firm Credit General had hired in the case.

Midwest was clearly not a client of the defense firm. The court found, however, that the "intended result of the transaction was to have a direct effect on Midwest's potential liability." 872 F.Supp. at 526. While the court found it foreseeable that the defense firm's representation would affect Midwest, it also perceived intent to benefit Midwest that was the gravamen of the decision. This seems to support the notion that in Illinois foreseeability alone may not be enough, without intent, to sustain a non-client's legal malpractice action.

However, having now broken the ice, it is entirely possible that our courts of record might give consideration to an argument that §51 of RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) ought to be adopted as our new balancing test for when an attorney will be liable to a non-client. Section 51 imposes a "duty to use care"

**(3) to a nonclient when and to the extent that:**

**(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;**

**(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and**

**(c) the absence of such a duty would make enforcement of those obligations to the client unlikely.**

The RESTATEMENT has been criticized because it asks only if a benefit is "one of the primary objectives" of the representation. Contrast that to the common law of Illinois, which seems focused very narrowly on whether the non-client is in fact the primary intended beneficiary. The RESTATEMENT would therefore broaden the Illinois attorney's exposure to the non-client when the non-client was not necessarily the primary intended beneficiary of the attorney's effort. The RESTATEMENT also fails to deal with a policy issue that heretofore has been considered by Illinois courts in each such case, that being the impact of such an approach on the attorney-client relationship and the legal profession as a whole. It would therefore be a drastic and perhaps ill-advised departure from precedent if Illinois courts of record were to abandon *Pelham* to adopt the RESTATEMENT. In fact, to date no other state has.

Since deciding *Pelham, supra,* Illinois courts have assiduously refrained from expanding the third-party beneficiary exception to the privity rule first announced in *Pelham.*

As in *Pelham,* the court in *Schechter, supra,* did not find a primary purpose to further the interests of a third party in the attorney-client relationship. There corporate creditors represented by trustees in bankruptcy were not seen as intended beneficiaries of corporate reorganization. The court stated:

> **The fact that a third party may benefit from an attorney's representation of his client does not mean that the attorney thereby owes a duty to the third party. (*First National Bank* [*of Moline v. Califf, Harper, Fox & Dailey*], 193 Ill.App.3d [83,] 86, 548 N.E.2d [1361,] 1363[, 139 Ill.Dec. 647 (3d Dist. 1989)]. As stated above, the law only imposes a duty upon an attorney for the benefit of a third party when the "primary purpose and intent" of the attorney-client relationship is to benefit the third party. It would strain the meaning of the "primary purpose and intent" language in *Pelham* for a third party to come within that category simply because he may benefit from the attorney's representation of his client. (See *Pelham*, 92 Ill.2d at 21, 440 N.E.2d at 100; *First National Bank*, 192 Ill.App.3d at 86, 548 N.E.2d at 1363.)** 627 N.E.2d at 111.

Likewise in *Pinckney v. Tigani*, No. 02C-08-129 FSS, 2004 Del.Super. LEXIS 386 (Nov. 30, 2004) (unpublished), the court held the line against expanding attorney exposure to third-party beneficiaries by holding that the beneficiary must at least be named in a testamentary instrument to have standing to sue the testator's attorney. To require less would "interfere with attorneys' loyalty to their clients." 2004 Del.Super. LEXIS 386 at *26, citing *Pelham, supra*, 440 N.E.2d at 101.

### 1. [3.4] Illinois' Adherence to the Intended Third-Party Beneficiary Rule

Illinois continues to hold fast to *Pelham v. Griesheimer*, 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982), and the intended third-party beneficiary rule. When the relationship between testator/executor and beneficiaries is not adversarial, the testator's lawyer will be held to have duties to the intended third-party beneficiaries. In *Rajcan v. Garvey*, 347 Ill.App.3d 403, 807 N.E.2d 725, 283 Ill.Dec. 120 (2d Dist. 2004), the defendant lawyers drafted a trust agreement for their client that did not include special needs trusts for the client's disabled children. The client and one of his children demanded copies of the trust agreement, and the lawyers promised to provide them but never did. The errors were finally discovered after the client died, and the children sued. The court held the allegations were sufficient to state claims against the lawyers because it was alleged that (a) they knew of the children's special needs and failed to advise the client-settlor about setting up a special needs trust and (b) they intentionally refused to give the agreement to the client or the children in an effort to conceal their negligence. 807 N.E.2d at 729.

In *Estate of Lis v. Kwiatt & Rueben, Ltd.*, 365 Ill.App.3d 1, 847 N.E.2d 879, 301 Ill.Dec. 869 (1st Dist. 2006), the court reaffirmed the rule that although an estate's lawyers are to act in the best interests of the estate and its intended beneficiaries, the exception to that rule applies when the beneficiaries become the estate's adversaries. At that point, the estate lawyers' duties revert solely to the estate, and to no one else.

When Shirley Lis died, her estate's executor, Sharon Rudnick, found a profit-sharing plan worth about $150,000 from her former employer. The employer distributed the plan's proceeds to Shirley's father without passing the proceeds through the estate. About two months later, the estate found more heirs, who objected to the plan's distribution and filed petitions asking the court to force the lawyers to reimburse the plan to the estate.

The court held the lawyers for the estate could not be surcharged for the plan amount. The drafters of a testamentary instrument may owe duties to the intended heirs, but those duties are more circumscribed when applied to the estate's lawyers after the testator dies. In *Estate of Lis*, there was no "clear indication" that the estate's lawyers had been hired to confer a benefit to the newly discovered heirs. 847 N.E.2d at 893. No one even knew the heirs existed when the estate's lawyers were hired and the plan's proceeds were distributed. Also, when the heirs objected and filed petitions, an adversary situation arose and the estate's lawyers could not possibly have had any duties to anyone other than the estate. The lawyer representing an estate "must give his first and only allegiance to the estate, in the event that such an adversarial situation arises." *Id.* Finally, even if a duty ran from the estate's lawyers to the heirs, it did not extend to the plan because as a matter of law it was not part of the estate. *Id.*

The Illinois Supreme Court has held that the next of kin in wrongful death actions are intended third-party beneficiaries to whom attorneys may owe a duty of care. *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 247, 306 Ill.Dec. 136 (2006). Wrongful death actions are brought for the benefit of the next of kin. The lawyers in *Burciaga* had clearly been hired to recover wrongful death damages for the benefit of the decedent's children, who had been in contact with the lawyers over the course of the litigation. Although other lawyers worked on the case, the decedent's children spoke only Spanish and thus were able to communicate only with Burciaga because he was the only one of their lawyers who also spoke Spanish.

In the wake of *Burciaga*, plaintiffs' lawyers in wrongful death actions should consider family members or next of kin as clients, complete with all the accoutrements of the attorney-client relationship. Every litigator knows that the purpose of a wrongful death lawsuit is to benefit the next of kin. Illinois courts might ultimately hold that next of kin in wrongful death litigation are entitled to confidential communications with the lawyers and periodic updates on major case developments.

### 2. [3.5] Minority or Disability as Tolling the Statute of Repose

Generally, the attorney malpractice plaintiff must file his or her lawsuit (a) within two years of discovering the cause of action or (b) if the injury does not occur until the death of the client, then within two years of the death or within the time for filing claims against the decedent's estate (usually six months). 735 ILCS 5/13-214.3(b). The repose period bars all claims if not filed within six years of the attorney's acts or omissions. 735 ILCS 5/13-214.3(c). Repose statutes are intended to be an absolute bar to stale claims, regardless of when or whether the plaintiff discovers the claim. The minority/disability saving provision, 735 ILCS 5/13-214.3(e), states:

> **If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, *the period of limitations* shall not begin to run until majority is attained or the disability is removed. [**Emphasis added.**]**

The Illinois Supreme Court has held that the "period of limitations" in subsection (e) refers to the statute of limitations in subsection (b) *and* the statute of repose in subsection (c). *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 239, 306 Ill.Dec. 136 (2006). Thus, when the third-party

beneficiary is a minor, *Burciaga*'s result is that neither a limitations period nor a repose period will begin to run until the minor reaches age 18. Taking the opinion to its logical conclusion, if the third-party beneficiary is disabled, the limitations and repose periods would not expire until the death of the disabled plaintiff. This seems to run counter to the stated purpose of a repose period — to provide finality and avoid endless liability. But given similar decisions when applied to disabled minor medical malpractice plaintiffs (*Antunes v. Sookhakitch*, 146 Ill.2d 477, 588 N.E.2d 1111, 167 Ill.Dec. 981 (1992); *Bruso v. Alexian Brothers Hospital*, 178 Ill.2d 445, 687 N.E.2d 1014, 227 Ill.Dec. 532 (1997)), the high court could not have reached any other result.

### 3. [3.6] Fraudulent Concealment as Tolling the Statute of Repose

The Illinois courts have taken up two cases since 2004 addressing allegations of fraudulent concealment of claims by non-clients against attorneys. Both times, the courts held fraudulent concealment, when pled and proved, will toll statutes of repose. Fraudulent concealment is not an independent cause of action against a lawyer. Rather, it is only a method of avoiding or tolling the statutes of limitation and repose. *Rajcan v. Garvey*, 347 Ill.App.3d 403, 807 N.E.2d 725, 729, 283 Ill.Dec. 120 (2d Dist. 2004). Allegations of fraudulent concealment are sufficient if they show "affirmative acts or representations designed to prevent discovery of the cause of action or to lull or induce a claimant into delaying the filing of his claim." 807 N.E.2d at 728, quoting *Dancor International, Ltd. v. Friedman, Goldberg & Mintz*, 288 Ill.App.3d 666, 681 N.E.2d 617, 623, 224 Ill.Dec. 302 (1st Dist. 1997). The *Rajcan* court simply assumed, without discussion, that fraudulent concealment would toll the statute of repose.

In *DeLuna v. Burciaga*, 223 Ill.2d 49, 857 N.E.2d 229, 239, 306 Ill.Dec. 136 (2006), the Illinois Supreme Court held that the fraudulent concealment tolling statute, 735 ILCS 5/13-215, applies not only to statutes of limitation, but also to statutes of repose. Past Supreme Court decisions held that §13-215 tolled repose periods as well as limitations periods. The courts have also tolled repose periods due to legal disability and have held that §13-215 might toll the medical malpractice repose periods. The court in *Burciaga* felt there was no reason to treat lawyers differently from physicians or hospitals, stating it is patently unfair for any defendant (but especially a lawyer, who occupies a fiduciary position) to conceal the plaintiffs' claims until the repose period runs out and then benefit from the statute of repose to defeat the claims. 857 N.E.2d at 243.

The allegations, if proved at trial, would show that Burciaga lulled the plaintiffs into a false sense of security that their case was going well. The court rejected Burciaga's suggestion that there could be no fraudulent concealment in a case involving litigation because the pleadings were a public record. He argued the plaintiffs would have discovered his negligence long before the repose periods ran out if only they had gone to the courthouse and read the publicly filed pleadings. The court, however, held the plaintiffs were entitled to rely on Burciaga's representations, and because they spoke and (presumably read) only Spanish, they could not have read the English-language pleadings. The clients were not lawyers and thus not qualified to monitor or evaluate Burciaga's work. 857 N.E.2d at 248. The Supreme Court did not cite *Rajcan* in its discussion.

### C. [3.7] Liability to Client's Creditors

An attorney can be liable to a non-client when the attorney disburses funds to a client with full knowledge that the client has either acknowledged some third party's ownership of the funds or assigned its interest in such funds.

Whether that ownership exists will depend ultimately on the insurer's policy language when proceeds of an insurance policy are involved. In *Western States Insurance Co. v. Louis E. Olivero & Associates,* 283 Ill.App.3d 307, 670 N.E.2d 333, 218 Ill.Dec. 836 (3d Dist. 1996), the defendant law firm settled a personal injury case for clients whose insurer had a subrogation interest. The insurer endorsed the settlement checks that named it as a payee. The defendant firm cashed the checks and deposited the proceeds into a trust account but did not pay the insurer even after the firm's clients filed for bankruptcy. The trial court granted the defendant's motion for summary judgment on Western States' claim against it for conversion. On appeal, the summary judgment was reversed, and summary judgment was entered for the insurer. Without citation to any authority, the appellate court stated that "an attorney is liable to a third party if he wrongfully releases that party's funds to his client." 670 N.E.2d at 336.

A more recent case calls into question whether a legal malpractice recovery can be subject to an insurer's lien due to Illinois' non-assignment of attorney negligence claims and the collateral source rule. In *St. Pierre v. Koonmen,* 371 Ill.App.3d 466, 863 N.E.2d 279, 309 Ill.Dec. 49 (2d Dist. 2007), the plaintiff was involved in an automobile accident and retained attorney Koonmen to represent her. The plaintiff sued Koonmen, alleging he failed to file her claims within the statute of limitations. Meanwhile, the plaintiff's insurer paid benefits to her.

After the plaintiff settled with Koonmen, the insurer intervened and asserted a lien. The appellate court held the insurer was not entitled to a lien. First, the insurance policy language allowing the lien if the plaintiff "recovers damages from another" was ambiguous. 863 N.E.2d at 281. That language could not be construed to permit the absurd result of creating a lien against recoveries for unrelated incidents. Giving full effect to the policy language would allow the insurer's lien if the plaintiff realized any recovery from anyone for any reason. Although the measure of damages was the injury in the auto accident, the injury's cause was the alleged negligence of the attorney, not that of the other driver. Second, the collateral source rule prohibited the lien. Third, allowing the lien under these circumstances would permit the insurer to accomplish a de facto assignment of the legal malpractice claim to a third party — something Illinois jurisprudence has long prohibited.

The lesson of *St. Pierre* is that attorneys settling malpractice actions should try to find out if any liens or potential liens exist. All parties involved should examine insurance policy and subrogation language carefully to determine whether liens arguably exist. *St. Pierre* suggests that the policy language must be clear and unambiguous to assert the lien. Plaintiffs settling legal malpractice lawsuits could contend that no lien is permissible under the collateral source rule and Illinois' long-standing proscription of legal malpractice claim assignments.

### D. [3.8] Business Entities

In representing partnerships and corporations, the issue often arises as to whom the attorney for the business entity actually represents. All too often, the subsequent question becomes "Who can sue the entity's lawyer?"

In Illinois, the attorney representing a business entity is the attorney for either the corporation or the partnership and not its shareholders, directors, officers, or partners. *McFail v. Braden,* 19 Ill.2d 108, 166 N.E.2d 46 (1960); *Sadler v. Creekmur,* 354 Ill.App.3d 1029, 821 N.E.2d 340, 290 Ill.Dec. 289 (3d Dist. 2004). In the absence of an agreement between the corporation and its lawyers, a minority shareholder is not an intended third-party beneficiary of the attorney-client relationship. An attorney was not liable to the minority shareholders of a closely held corporation even though the defendant attorney allegedly knew they expected him to protect their individual interests. *Felty v. Hartweg,* 169 Ill.App.3d 406, 523 N.E.2d 555, 557, 119 Ill.Dec. 799 (4th Dist. 1988).

A lawyer for a partnership is not liable to an individual partner, in the absence of an agreement, even when the individual partner is affected by the lawyer's services and the partner is personally liable for the partnership's obligations. *Kopka v. Kamensky & Rubenstein,* 354 Ill.App.3d 930, 821 N.E.2d 719, 724 – 725, 290 Ill.Dec. 407 (1st Dist. 2004). In *Sadler, supra,* the plaintiff was a member of an incorporated property owners' association. She sued the association's lawyer for advising the association's board of directors to refuse to enforce restrictive covenants and inducing the board to breach its fiduciary duties to its members. The court upheld dismissal of the claims against the lawyer, concluding there were no facts to establish the lawyer had any legal duty to an association member. 821 N.E.2d at 351.

On the other hand, Illinois has recognized the right of shareholders to sue their corporate attorney in a shareholder derivative action. *Karris v. Water Tower Trust & Savings Bank,* 72 Ill.App.3d 339, 389 N.E.2d 1359, 27 Ill.Dec. 951 (1st Dist. 1979).

### E. [3.9] Agent of Undisclosed Principal

Illinois has not yet directly addressed the question of whether an undisclosed principal may sue his or her agent's attorney, but it seems likely that Illinois will follow the lead of Minnesota in *CJP Enterprises, Inc. v. Gernander,* 521 N.W.2d 622 (Minn.App. 1994). There, the court held that the agent of an undisclosed real estate purchaser could not sue the lawyer he hired to draft a deed since the agent had no actual interest in the property. The Minnesota appellate court, in accord with *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982), noted that it is entirely possible that the agent and undisclosed principal could have conflicting interests.

Of course, this rule applies only to nondisclosed principals. The entire third-party beneficiary concept of liability assumes a disclosed principal as the damaged party.

### F. [3.10] Successors in Interest

Illinois has recognized that a person can assert a legal malpractice claim through equitable subrogation. *National Union Insurance Co. v. Dowd & Dowd, P.C.,* 2 F.Supp.2d 1013, 1019 – 1023 (N.D.Ill. 1998) (applying Illinois law). However, the general rule remains in Illinois that it is contrary to public policy to voluntarily assign a legal malpractice claim to another. *Brocato v. Prairie State Farmers Insurance Ass'n,* 166 Ill.App.3d 986, 520 N.E.2d 1200, 1201 – 1202, 117 Ill.Dec. 849 (4th Dist.), *appeal denied,* 121 Ill.2d 567 (1988); *Clement v. Prestwich,* 114 Ill.App.3d 479, 448 N.E.2d 1039, 1041 – 1042, 70 Ill.Dec. 161 (2d Dist. 1983).

Illinois has not yet determined whether a successor in interest may sue its predecessor's attorney. Other states that have considered the question have split on the issue. Washington and Delaware have allowed such suits. *See Ikuno v. Yip,* 912 F.2d 306 (9th Cir. 1990); *Pioneer National Title Insurance Co. v. Child, Inc.,* 401 A.2d 68 (Del. 1979). The Nebraska Supreme Court has ruled, however, that a corporation that purchased the assets and acquired all rights by assignment from a bankrupt corporation could not sue the bankrupt's corporate attorney. *Earth Science Laboratories, Inc. v. Adkins & Wondra, P.C.,* 246 Neb. 798, 523 N.W.2d 254 (1994). The non-assignability of a legal malpractice cause of action set out in *Earth Science* was distinguished from the assignability of a breach of fiduciary duty cause of action in a case in which a grandniece abused a power of attorney by diverting funds from her great-aunt's checking account. In *North Bend Senior Citizens Home, Inc. v. Cook,* 261 Neb. 500, 623 N.W.2d 681 (2001), the Nebraska Supreme Court found that even though legal malpractice claims may not be assignable, assignability of breach of fiduciary duty claims against persons holding powers of attorney does not violate the public policy behind non-assignability of legal malpractice actions. *See also Eli's, Inc. v. Lemen,* 256 Neb. 515, 591 N.W.2d 543 (1999), in which the assignee of four creditors of a privately held corporation was allowed to pursue a claim for fraudulent transfer of assets of the corporation to its principal shareholder and operating officer and other members of his family.

### G. [3.11] The Effect of Death

At common law, a tort claim abates upon death, but a breach of contract action survives the plaintiff's demise. *Butterman v. Chamales,* 73 Ill.App.2d 399, 220 N.E.2d 81 (1st Dist. 1966).

By statute, however, in Illinois a legal malpractice action survives a plaintiff client's death. The plaintiff client's estate succeeds to the decedent's interests in the matter. The dead client's heirs do not own the cause of action. It passes directly to the decedent's personal representative. *McGill v. Lazzaro,* 92 Ill.App.3d 393, 416 N.E.2d 29, 48 Ill.Dec. 134 (1st Dist. 1980). Surely, the same applies to the claims of non-client, third-party beneficiaries.

### H. [3.12] Fraud

There is no question that an Illinois attorney can be liable to his or her client for fraud. *In re Gerard,* 132 Ill.2d 507, 548 N.E.2d 1051, 139 Ill.Dec. 495 (1989). In *Gerard,* attorney Gerard received a relatively large fee for the simple act of negotiating certificates of deposit for an elderly client. While that was deemed to be fraud, a $140,000 referral fee was approved in

*Corcoran v. Northeast Illinois Regional Commuter R.R.*, 345 Ill.App.3d 449, 803 N.E.2d 87, 280 Ill.Dec. 857 (1st Dist. 2003), even though the referring attorney did little or no work on the claim. *Corcoran* involved a contingency contract that awarded Corboy & Demetrio 25 percent of any settlement and further provided that 40 percent of that 25-percent fee would be paid to the referring attorney.

In *Scholes v. Stone, McGuire & Benjamin*, 786 F.Supp. 1385 (N.D.Ill. 1992), attorneys who represented a securities broker who perpetrated certain fraudulent schemes resulting in the broker's incarceration were held liable to the receiver and the investor class that brought claims for legal malpractice. The attorneys knew of the broker's criminal activity and the fraudulent representations made by the broker. However, they continued to represent him and the receivership entities that he created as vehicles for the sale of securities. The receiver and the investor class also brought an action against the attorneys under the Securities Exchange Act of 1934 alleging claims for primary and secondary liability, but the court held that under the Act the defendant attorneys' actions did not establish primary liability, which requires a plaintiff to prove that the defendant "(1) made an untrue statement of material fact or omitted a material fact that rendered the statements made misleading, (2) in connection with a securities transaction, (3) with the intent to mislead, and (4) which caused plaintiff's loss." 786 F.Supp. at 1400, quoting *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 943 (7th Cir. 1989). In addition, the court found that the attorneys could not be primarily liable because they were not "an issuer, director, signatory of a prospectus, identified drafter of documents, [or] offeror or seller of securities." 786 F.Supp. at 1400.

In many jurisdictions, an attorney can be liable to a non-client, even an adversary, for fraud. *See, e.g., Waxman v. Boren, Elperin, Howard & Sloan*, 221 Cal.App.3d 519, 270 Cal.Rptr. 540 (1990); *Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987); *Neff v. Indiana State University Board of Trustees ex rel. Indiana State University*, 538 N.E.2d 255 (Ind.App. 1989). Disappointed investors alleging securities fraud are a common source of such claims. *See Moore v. Fenex, Inc.*, 809 F.2d 297 (6th Cir. 1987).

In *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill.App.3d 712, 495 N.E.2d 1132, 99 Ill.Dec. 397 (1st Dist. 1986), the appellate court held that an Illinois attorney was not liable to his client's employer when the client collected insurance benefits from both his employer and his personal hospitalization insurer for a non-work-related injury, even though the employee's collective bargaining agreement gave the employer a right of reimbursement from employees who collected medical expenses for a non-work-related injury from another insurer. The employer alleged that the employee's attorney had improperly advised his client that he need not reimburse his employer. The appellate court held:

> **Although incorrect advice as to a client's contractual obligations might cause that client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect.** 495 N.E.2d at 1136, quoting *Schott v. Glover*, 109 Ill.App.3d 230, 440 N.E.2d 376, 379, 64 Ill.Dec. 824 (1st Dist. 1982).

The greatest obstacle that a non-client asserting fraud must overcome is the element of justifiable reliance. In *Renovitch v. Kaufman*, 905 F.2d 1040 (7th Cir. 1990), investors brought a securities fraud suit against two attorneys alleging misrepresentations and material omissions in two brochures relied on by the investors. The Seventh Circuit affirmed a district court summary judgment for the lawyers. The Seventh Circuit pointed out that there was no evidence that either attorney had any involvement with the preparation or distribution of the brochures. More importantly for the purposes of this chapter, the court found no evidence to prove any of the essential elements of fraud in Illinois, *i.e.*, "(1) a false statement of material fact, (2) knowledge or belief of the falsity by the party making it, (3) intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statements, and (5) damage to the other party resulting from such reliance." 905 F.2d at 1049, quoting *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 591, 137 Ill.Dec. 635 (1989).

## I. [3.13] Aiding and Abetting Client Fraud or Fiduciary Breaches; Lawyer Participation in Civil Conspiracy

Many states recognize a third party's right to sue an attorney who aids or substantially assists a client in the performance of a wrongful act when the lawyer should have appreciated that his or her conduct furthered the illegal or tortious act. *See, e.g., Granewich v. Harding*, 329 Or. 47, 985 P.2d 788 (1999); *Howard v. Superior Court of Los Angeles County*, 2 Cal.App.4th 745, 3 Cal.Rptr.2d 575 (1992).

Lawyers can be held liable for civil conspiracy on evidence that they participated in a conspiracy with their clients. *Bosak v. McDonough*, 192 Ill.App.3d 799, 549 N.E.2d 643, 645 – 646, 139 Ill.Dec. 917 (1st Dist. 1989).

The First District Appellate Court has said in dicta that an attorney may be held liable for aiding and abetting breaches of fiduciary duties. *Thornwood, Inc. v. Jenner & Block*, 344 Ill.App.3d 15, 799 N.E.2d 756, 278 Ill.Dec. 891 (1st Dist. 2003). That case involved allegations of a double-dealing partner who used his lawyers to aid and abet a scheme to defraud his partner and procure liability releases. The two partners, Thornton and Follensbee, formed Thornwood, Inc., to develop Thornton's land into a PGA Tour golf course. After the PGA cut off negotiations with Thornwood, Follensbee reached a conditional agreement with the PGA to develop the land, unbeknownst to Thornton. Follensbee offered to buy Thornton out and had Jenner & Block, his lawyers, prepare settlement agreements and releases that Thornton signed. Neither Follensbee nor Jenner told Thornton of the secret negotiations with the PGA, and they never told Thornton that his land would increase in value because of the conditional agreements.

In his lawsuit, Thornton accused Jenner and three of its individual lawyers of aiding and abetting Follensbee, its client, in (1) fiduciary breaches, (2) a scheme to defraud, and (3) a scheme of fraudulent inducement. Jenner responded that Thornton had released all of the claims when he signed the settlement agreements. The court disposed of that contention by noting Thornton could not have released Jenner or the individual lawyers when he was not aware of their involvement in helping Follensbee in his tortious acts. Second, Thornton had stated a claim against Jenner for aiding and abetting fiduciary breaches. Illinois had previously recognized theories of aiding and

abetting and concert of action. No Illinois court had ever held as a matter of law that a lawyer could not be held liable for aiding and abetting. Citing *Bosak,* the court noted that lawyers could be held liable for civil conspiracy.

Thornton's allegations were sufficient to state claims for aiding and abetting fiduciary breaches because Jenner allegedly (1) failed to disclose to Thornton the continued negotiations with the PGA, (2) counseled Follensbee on producing marketing literature that did not identify Thornton as a partner, and (3) prepared legal documents and releases without telling Thornton of the PGA conditional agreements. Jenner knew Thornton was a partner and also knew Follensbee had accompanying fiduciary duties. 799 N.E.2d at 768 – 769.

*Thornwood* seems to open the door for aiding and abetting claims against lawyers. *Thornwood* and the cases before it would require that the underlying conduct constitute a tort (*Reuben H. Donnelley Corp. v. Brauer,* 275 Ill.App.3d 300, 655 N.E.2d 1162, 211 Ill.Dec. 779 (1st Dist. 1995)), or at least fiduciary breaches. The conduct alleged in *Thornwood* indicates a high level of knowledge on the lawyers' part — they knew Thornton was their client's partner, yet they allegedly advised their own client to breach his fiduciary duties and helped him accomplish those breaches. It is possible that *Thornwood* could be cited to support claims by non-clients against lawyers for aiding and abetting other types of tortious client activity.

A similar case is *Hefferman v. Bass,* 467 F.3d 596 (7th Cir. 2006), in which the court held an attorney could be held liable for aiding and abetting fraud, fiduciary breaches, or fraudulent inducement. The tort of aiding and abetting in Illinois requires pleading and proof of three elements: (1) the party whom the defendant aids performed a wrongful act causing injury; (2) the defendant knew of his or her role when the assistance was provided; and (3) the defendant knowingly and substantially assisted the wrongful act. 467 F.3d at 601.

### J. [3.14] Interference with an Advantageous Relationship

Since we strive mightily to overcome our opponents in litigation as well as in some other aspects of lawyering, it is not surprising that our efforts and/or advice sometimes injure another person's contractual, business, or advantageous relationship.

In *Horwitz v. Holabird & Root,* 312 Ill.App.3d 192, 726 N.E.2d 632, 244 Ill.Dec. 657 (1st Dist. 2000), the attorneys had written letters to 40 of the plaintiffs' peers and business associates stating that the plaintiffs had engaged in illegal activity by reporting partnership losses to the Internal Revenue Service in greater amounts than allowed by law. Plaintiffs sued the defendant attorneys for tortious interference with business relationships. They also sued the attorneys' clients, alleging the clients were vicariously liable for the attorneys' conduct and that the attorneys were agents of their clients. The trial court granted summary judgment to the clients, holding they could not be held liable in respondeat superior. The appellate court reversed, holding a fact question existed as to whether the attorneys acted within the scope of their authority and whether the clients had ratified the allegedly tortious interference. The appellate court stated: "[C]lients are principals, the attorney is an agent, and under the law of agency, the principal is bound by his chosen agent's deeds." 726 N.E.2d at 635.

But the Illinois Supreme Court reversed the appellate court and reinstated the trial court's summary judgment for the clients. *Horwitz v. Holabird & Root,* 212 Ill.2d 1, 816 N.E.2d 272, 287 Ill.Dec. 510 (2004). The court held that attorneys may be both independent contractors and agents, but as to specific conduct, they are either independent contractors or agents. Lawyers are presumptively independent contractors when they exercise their professional judgment, but could be considered agents when they act at the specific direction of the client. The clients and attorneys in *Horwitz* were accused of intentional torts. On the facts shown, the clients could not be liable for the lawyers' alleged intentional conduct without proof of ratification. 816 N.E.2d at 279 – 280, 284. Justices Freeman and McMorrow dissented, contending that when lawyers act for clients, they do so at all times as both independent contractors and as agents.

Note that in *Horowitz* the attorneys did not seek summary judgment in the trial court. The defendant attorneys may have elected to "keep their powder dry." When such a case is tried, one of the elements of the plaintiff's burden of proof is to show that the attorney acted with actual malice.

In *Boyd Real Estate, Inc. v. Shissler Seed Co.*, 213 Ill.App.3d 648, 571 N.E.2d 1171, 157 Ill.Dec. 152 (3d Dist.), *appeal denied*, 141 Ill.2d 536 (1991), an Illinois attorney who advised his client not to consummate a real estate deal was held not liable to the real estate broker who sued the lawyer for his lost commission. The court agreed with the trial court's finding that the plaintiff could not sustain his burden of proof because the offending advice was protected by the attorney-client privilege. The court pointed out, however, that the unqualified privilege can be overcome by proof of actual malice toward the non-client plaintiff. 571 N.E.2d at 1174, citing *Schott v. Glover,* 109 Ill.App.3d 230, 440 N.E.2d 376, 380, 64 Ill.Dec. 824 (1st Dist. 1982). "Actual malice" has been defined as a desire to cause a harm independent of and unrelated to the attorney's representation of the client. *Miller v. St. Charles Condominium Ass'n,* 141 Ill.App.3d 834, 491 N.E.2d 125, 128, 96 Ill.Dec. 311 (2d Dist. 1986).

In *Edelman, Combs & Latturner v. Hinshaw & Culbertson,* 338 Ill.App.3d 156, 788 N.E.2d 740, 273 Ill.Dec. 149 (1st Dist. 2003), the Hinshaw firm represented creditors in bankruptcy. They circulated memoranda to other lawyers, disciplinary committees, and bankruptcy trustees that reported that the debtors' consumer protection claims were usually exempted from the debtors' bankruptcy estates instead of being applied toward satisfaction of the creditors' claims. The First District stated that although imputation of a crime or unprofessional conduct, if false, could be defamation, the accusations in this case were absolutely privileged except in those instances in which they were published to attorneys who had no connection to the litigation. The court felt that civil conspiracy could not be shown in an agency setting because that would mean that the conspirators were essentially conspiring with themselves.

Inconsistent decisions have obtained on the question of whether malice toward a non-client plaintiff is necessary to avoid the general rule that an attorney is not liable for offering advice that results in interference with a business relationship that some third party has with the attorney's client. In *Roy v. Coyne*, 259 Ill.App.3d 269, 630 N.E.2d 1024, 196 Ill.Dec. 859 (1st Dist. 1994), the court held that malice is really not an issue and that a plaintiff need show only that a defendant intentionally induced another to breach a contract with him or her or intentionally interfered with his or her future business prospect.

The court in *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 288 Ill.App.3d 880, 681 N.E.2d 564, 224 Ill.Dec. 249 (1st Dist. 1997), drew a distinction between tortious interference with a business relationship and tortious interference with a prospective economic advantage. In the tort of interference with a prospective economic advantage, the defendant's intent need only be purposeful interference to defeat a business expectancy, not actual malice. This holding presents a bit of a conundrum considering that the higher burden of proof applies in cases in which an actual contractual obligation and relationship exists and the lower standard of proof applies in cases in which the expectation of economic benefit is only prospective, which connotes speculation to some degree.

The agent's immunity rule can come into play when a third party attempts to hold an attorney liable for interfering with an advantageous relationship. Under the agent's immunity rule, an agent is not liable for conspiring with the principal when the agent is acting in an official capacity on behalf of the principal. *Pavicich v. Santucci*, 85 Cal.App.4th 382, 102 Cal.Rptr.2d 125 (2000). In *Pavicich*, the court held that if an attorney commits actual fraud in his or her dealings with third parties, the fact that he or she does so in the capacity of attorney does not relieve the attorney of liability. Similarly, when an attorney gives a client a written opinion with the intention that it be transmitted to and relied on by the plaintiff in dealing with the client, then the attorney owes the plaintiff a duty of care in providing the advice because the plaintiff's anticipated reliance on it is the end aim of the transaction.

## K. [3.15] Conversion

Lawyers can be sued by a non-client for conversion when they fail to honor an assignment of their client's property. In *Chicago District Council of Carpenters Welfare Fund v. Gleason & Fritzshall*, 295 Ill.App.3d 719, 693 N.E.2d 412, 230 Ill.Dec. 283 (1st Dist. 1998), attorneys for a personal injury litigant forged the endorsement of their client's co-payee, a union with which the client had agreed to pay reimbursement for any third-party insurance proceeds received in addition to any union fund payments for the same injury. The appellate court reversed the summary judgment the trial court had granted to the defendant attorneys and declared that the defendant attorneys could be sued for conversion, employing the standard elements of the tort of conversion. In addition, the appellate court held that the plaintiff could attempt to recover punitive damages since forging checks is not the practice of law. The statutory bar to punitive damages in legal malpractice actions set out in 735 ILCS 5/2-1115 therefore did not apply.

## L. [3.16] Abuse of Process

Illinois attorneys can be liable to non-clients for wrongful issuance of process. In *Mandziara v. Canulli*, 299 Ill.App.3d 593, 701 N.E.2d 127, 233 Ill.Dec. 484 (1st Dist. 1998), a non-client sued an attorney who subpoenaed the non-client's mental health records in a custody case without first obtaining a court order in violation of 740 ILCS 110/10.

## M. [3.17] Malicious Prosecution

Many of the physician-clients the authors of this chapter have defended in medical malpractice litigation have expressed great appetite for "a countersuit against the plaintiff's

attorney for bringing this frivolous lawsuit." We have not yet failed to dissuade such actions. We explain to our exercised physician-clients that the opposing lawyer is not the author of the facts on which the irritating lawsuit is premised, so a malicious prosecution countersuit would be a futile waste of money and effort. Such claims have lately come into vogue, however, and are discussed in detail in Chapter 4 of this handbook.

### N. [3.18] Negligent Misrepresentation

In *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 155 Ill.2d 223, 613 N.E.2d 702, 184 Ill.Dec. 385 (1993), the sellers of corporate stock sued the attorneys who had represented the stock purchasers. The purchasers' attorneys drafted an opinion letter stating that the attorneys had no reason to believe that any representation or warranty of the purchasers made in the sales agreement was untrue or misleading in any material respect. Two weeks later, the purchasers filed for bankruptcy, and the sellers then sued the purchasers' attorneys, alleging that they sustained damage due to the depreciation of stock that had been sold to the purchasers and later returned.

In *Geaslen*, the Supreme Court held that the sellers could not state a cause of action for negligence or breach of fiduciary duty because the plaintiffs could not show that the primary purpose of the attorney-client relationship itself was to benefit or influence the sellers. 613 N.E.2d at 703 – 704. The court stated that generally there is no fiduciary duty between an individual and the attorney for his or her opponent. 613 N.E.2d at 704, citing *Gold v. Vasileff*, 160 Ill.App.3d 125, 513 N.E.2d 446, 112 Ill.Dec. 32 (5th Dist. 1987). The *Geaslen* court stated the following proposition:

> **[A] confidential or fiduciary relationship requires a showing that one person has reposed trust and confidence in another who thereby gains a resulting influence or superiority over the other. [Citations.] Generally, this is accomplished by establishing facts showing an antecedent relationship which gives rise to trust and confidence reposed in another.** 613 N.E.2d at 704, quoting *Ray v. Winter*, 67 Ill.2d 296, 367 N.E.2d 678, 682, 10 Ill.Dec. 225 (1977).

The *Geaslen* court found that a duty of care did in fact run from the purchasers' attorneys to the sellers, not because the attorneys had any fiduciary duty to the sellers, but because the attorneys were obligated to the purchasers to perform services with due care for a third party, *i.e.*, the sellers.

## III. STATUTORY LIABILITY TO NON-CLIENTS

### A. [3.19] Securities Act of 1933 and Securities Exchange Act of 1934

Federal regulation of stocks and bonds offered for sale to the public (securities) grew out of the great stock market crash of 1929. The Securities Act of 1933 (1933 Act), 15 U.S.C. §77a, *et seq.*, was designed to (1) provide investors with full disclosure of material information about public offerings, (2) protect investors against fraud, and (3) promote fair dealing by the imposition of sanctions. The 1933 Act imposed regular reporting requirements on companies

whose stock is listed on national exchanges. However, such huge enterprises could not be efficiently and effectively controlled by a statute, so within a year Congress passed the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. §78a, *et seq.*, establishing the Securities and Exchange Commission (SEC) to provide more flexible enforcement power. See, *e.g.*, 15 U.S.C. §§78i, 78s, 78u.

Section 10(b) of the 1934 Act makes it unlawful for any person

> **[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.** 15 U.S.C. §78j(b).

In 1942, the SEC promulgated Rule 10b-5 under the 1934 Act, which provides:

> **It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or by the mails or of any facility of any national securities exchange,**
>
> **(a) To employ any device, scheme, or artifice to defraud,**
>
> **(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or**
>
> **(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,**
>
> **in connection with the purchase or sale of any security.** 17 C.F.R. §240.10b-5.

Section 10(b) of the 1934 Act did not, however, create any express civil remedy for its violation. Such a private cause of action was first recognized in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6, 30 L.Ed.2d 128, 92 S.Ct. 165 (1971).

In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976), the debate was finally resolved as to whether it was enough simply to violate §10(b) of the 1934 Act negligently or whether such a violation required scienter. In *Ernst & Ernst*, the Court ruled that there could be no private cause of action for damages absent an allegation of intent to deceive, manipulate, or defraud. The Court stated:

> **This brief explanation of §10(b) by a spokesman for its drafters is significant. The section was described rightly as a "catchall" clause to enable the Commission "to deal with new manipulative [or cunning] devices." It is difficult to believe that any lawyer . . . would use these words if the intent was to create liability for merely negligent acts or omissions. . . . Neither the legislative history nor the briefs**

> **supporting respondents identify any usage or authority for construing "manipulative [or cunning] devices" to include negligence.** 96 S.Ct. at 1385 – 1386, citing Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 115 (1934).

Subsequently, the Tenth Circuit held that the Supreme Court's decision in *Ernst & Ernst* abrogated the defense of due diligence. In *Holdsworth v. Strong*, 545 F.2d 687, 693 (10th Cir. 1976), the Tenth Circuit stated:

> **Another important result of the *Ernst & Ernst* decision is that it brings the standards for 10b-5 liability closer to the analogous tort of deceit or intentional misrepresentation.**

If any doubt exists as to what constitutes "manipulation," the Court strikingly defined the term in *Ernst & Ernst* as follows:

> **It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.** 96 S.Ct. at 1384.

A lawyer who runs afoul of Rule 10b-5 may have decades to consider the consequences. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 115 L.Ed.2d 321, 111 S.Ct. 2773, 2779 – 2780 (1991), the Court pointed out that because of the nontraditional origins of the private cause of action under §10(b) of the 1934 Act (*i.e.*, development at common law rather than by statute), there exists no stated statute of limitations on such a claim. *Lampf* was an investor's action under §10(b) against a law firm for preparing an offering memorandum, alleging misrepresentation.

However, when Congress has failed to provide an express statute of limitations for a federal cause of action, a court must borrow or absorb the local time limitation most analogous to the case at hand. In *Lampf*, that was, fortunately for the defendant attorneys, a one-year statute of limitations after discovery of the cause of action by the plaintiff.

In *Lampf*, the Supreme Court held that actions brought under §10(b) and Rule 10b-5 must be commenced "within one year after the discovery of the facts constituting the violation and within three years after such violation." 111 S.Ct. at 2780 & n.6, quoting 15 U.S.C. §78i(e). On the same day that the *Lampf* decision was announced, the Supreme Court also stated that the statute of limitation announced in *Lampf* was to be applied retroactively to all §10(b) cases pending in federal courts. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L.E.2d 481, 111 S.Ct. 2439 (1991).

In response to the *Lampf* and *Beam* decisions, however, Congress enacted a new §27A of the 1934 Act, 15 U.S.C. §78aa-1, which effectively overruled the decision in *Beam* insofar as it applied to *Lampf* and established that the statute of limitations for actions under §10(b) and Rule 10b-5 set forth in *Lampf* could not be applied retroactively.

Subsection 27A(a) now provides that the applicable statute of limitations for civil cases seeking recovery under the 1934 Act shall be the limitations period that applied prior to *Lampf. See First v. Prudential Bache Securities, Inc.*, No. CV 91-0047 H(M), 1992 U.S.Dist. LEXIS 7782 (S.D.Cal. Mar. 24, 1992). The statute states:

> **The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.** 15 U.S.C. §78aa-1(a).

In *Securities & Exchange Commission v. Coven*, 581 F.2d 1020 (2d Cir. 1978), the Second Circuit held that §17a of the 1933 Act, 15 U.S.C. §77q(a), did not require a showing of willfulness or an intent to defraud for a violation. However, the court reversed a verdict against the defendant attorney, finding that while he used bad judgment in failing to investigate and disclose illegal activities of his corporate client, there was no evidence that he should have known that his inaction would further illegal activity.

In *Securities & Exchange Commission v. O'Hagan*, 793 F.Supp. 218 (D.Minn. 1992), an attorney was charged with gaining material nonpublic information regarding a merger that he used to his personal financial advantage in violation of the 1934 Act. As a result, the SEC sought equitable relief in the form of a permanent injunction prohibiting the attorney from violating certain securities laws and an order of disgorgement under §27 of the 1934 Act, 15 U.S.C. §78aa, as well as civil penalties under 15 U.S.C. §78u-1.

The fact that an individual is an attorney affords no special immunity from lawsuits premised on the 1933 Act. *Securities & Exchange Commission v. Frank*, 388 F.2d 486 (2d Cir. 1968); *Sohns v. Dahl*, 392 F.Supp. 1208 (W.D.Va. 1975). It is equally true that attorneys can be and often are sued for a violation of the various state securities laws. *See Buford White Lumber Company Profit Sharing & Savings Plan & Trust v. Octagon Properties, Ltd.*, 740 F.Supp. 1553 (W.D.Okla. 1989).

### B. [3.20] Illinois Business Corporation Act

The attorney for a corporate client owes his or her duty to the corporate entity, not its individual shareholders, officers, or directors. *Majumdar v. Lurie*, 274 Ill.App.3d 267, 653 N.E.2d 915, 918, 210 Ill.Dec. 720 (1st Dist. 1995), citing *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill.App.3d 817, 413 N.E.2d 1299, 46 Ill.Dec. 186 (1st Dist. 1980).

Therefore, a shareholder derivative action against the corporation lawyer, by definition, is a suit by a non-client even though the corporation is the nominal plaintiff in such a case.

The law of most western civilizations is based on biblical precepts. The biblical admonition against trying to serve two masters concurrently is one of the earliest elucidations of the conflict of interest concept. One of the easiest ways for an attorney to develop prohibited conflicts of interest and expose himself or herself to liability to non-clients is to represent a corporation, sit on its board of directors, and serve as a corporate officer.

In *Sears v. Weissman*, 6 Ill.App.3d 827, 286 N.E.2d 777 (1st Dist. 1972), Weissman, a Cook County attorney, incorporated a bomb shelter construction company, sat on its board, and served as its secretary, registered agent, and corporate attorney. The two incorporators, Helberg and Pine, were sloppy bookkeepers. The corporate checkbook was the sum and substance of all the financial records of National Atomic Fallout Shelters, Inc. National contracted with the plaintiff, an elderly woman, to construct a fallout shelter for $3,880. Weissman never saw the corporate checkbook. On the date National contracted with Dorothy Sears, Pine and Helberg had reduced their initial capitalization of $15,000 to $58.09 by issuing checks to themselves for "retirement of [their] common stock." 286 N.E.2d at 780. The deposit of Sears' prepayment in full of $3,880 was soon followed by checks in the amount of $3,750 to Pine and Helberg and another business solely owned by Helberg and Pine.

No work was performed on Sears' fallout shelter. A year later, National filed with the Secretary of State for dissolution. Wiessman was not aware of Sears or her contract with National, so he did not serve notice on her of the voluntary dissolution.

Under former Ill.Rev.Stat. (1961), c. 32, ¶157.42-6, all directors were jointly liable if they failed to serve notice of intent to dissolve to a known creditor.

However, since Weissman was ignorant of the questionable financial dealings and there was no clear and convincing evidence of conspiracy, the court found that Weissman was not jointly liable with the other two directors. 286 N.E.2d at 783 – 784.

Although the court absolved Weissman, it warned all Illinois attorneys:

> **This record illustrates the possible liability to which members of the bar may be subjected when they chose to act as directors or officers of corporations organized for their clients. The glamour, and less frequently the financial return, which may follow from being a corporate official often conceal a situation which may turn out to be fraught with danger for the honest and well intentioned but unwary lawyer.** 286 N.E.2d at 784.

### C. [3.21] Contribution

The Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*, allows any defendant to file a third-party action or cross-claim to avoid paying more than that defendant's pro rata share of the total culpability of all parties found liable to the plaintiff.

In *Alper v. Altheimer & Gray*, 257 F.3d 680 (7th Cir. 2001), the Seventh Circuit reversed the district court's dismissal of a contribution claim for legal malpractice. The plaintiffs filed suit against Altheimer & Grey, alleging legal malpractice in drafting documents for the plaintiffs to sell the retail assets of the plaintiffs' corporation, TPI, to another corporation, DTS. The plaintiffs later learned that the sale documents had also transferred the wholesale division of TPI contrary to the sellers' intentions. The plaintiffs first hired the law firm of Bickel & Brewer to pursue their claims against the purchasers and a former employee in state and U.S. district court. Bickel voluntarily dismissed the claims he had filed in state court. The plaintiffs subsequently sued

Altheimer & Grey for legal malpractice in the U.S. district court. Altheimer & Grey then filed a third-party action against Bickel, alleging Bickel committed legal malpractice in pursuing the plaintiffs' claim against DTS and the former employee. Bickel moved to dismiss the contribution claim based on *Vroegh v. J&M Forklift,* 165 Ill.2d 523, 651 N.E.2d 121, 209 Ill.Dec. 193 (1995), which held that the contribution defendant was liable in tort to the plaintiffs at the time of the injury for which recovery was sought. Since Bickel represented the plaintiffs subsequent to the representation of Altheimer & Grey, Bickel argued he could not be a joint tortfeasor with Altheimer & Grey. The Seventh Circuit found the proper focus "is not the timing of the parties' conduct which created the injury, but the injury itself." 257 F.3d at 685, quoting *People v. Brockman,* 148 Ill.2d 260, 592 N.E.2d 1026, 1030, 170 Ill.Dec. 346 (1992). The *Alper* court also held that the injury does not have to be concurrent. 257 F.3d at 687.

The *Alper* court noted that the Illinois Supreme Court has recognized that an attorney may bring a third-party action for contribution against a successor attorney. 257 F.3d at 688, citing *Faier v. Ambrose & Cushing, P.C.,* 154 Ill.2d 384, 609 N.E.2d 315, 316, 182 Ill.Dec. 12 (1993), *Brown-Seydel v. Mehta,* 281 Ill.App.3d 365, 666 N.E.2d 800, 217 Ill.Dec. 131 (1st Dist. 1996), and *Goran v. Glieberman,* 276 Ill.App.3d 590, 659 N.E.2d 56, 213 Ill.Dec. 426 (1st Dist. 1995).

While the plaintiffs, the Alpers, were not non-clients to Altheimer & Grey, the third-party plaintiff, Altheimer & Grey, was certainly a non-client to the third-party legal malpractice defendant, Bickel.

### D. [3.22] Civil Rights Act of 1871

42 U.S.C. §1983 provides:

> **Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.**

In *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975), a divorce litigant sued his wife's attorney under §1983 for obtaining an order to show cause to pay the divorce judgment to the ex-wife. The Seventh Circuit held that a private attorney, while participating in the trial of a private state court action, is not acting under color of state law. 520 F.2d at 770, citing *Skolnick v. Martin,* 317 F.2d 855, 857 (7th Cir.), *cert. denied,* 84 S.Ct. 199 (1963).

Generally, what is needed to bring a private attorney's conduct under color of state law is proof of conspiracy with a public official to deprive the plaintiff of his or her civil rights. *See Brown v. Dunne,* 409 F.2d 341, 343 – 344 (7th Cir. 1969).

In contrast, in *Sparkman v. McFarlin,* 552 F.2d 172, 175 – 176 (7th Cir. 1977), the plaintiff alleged that her mother's attorney conspired with a state court judge to enter an order of involuntary sterilization. She also joined the hospital and three doctors who participated in the surgery. The U.S. district court initially dismissed the complaint against the state court judge on a finding of judicial immunity. After the state court judge was dismissed, the remaining defendants were also dismissed on the finding that without the state judge in the case, state action was lacking.

The Seventh Circuit subsequently reversed the district court's decision, finding that allegations of ex parte communication between the judge and the mother's attorney, followed by summary rulings in favor of the plaintiff's adversary (her mother), stated a cause of action under §1983. On certiorari, the United States Supreme Court reversed the Seventh Circuit and remanded the action, finding that the judge's "approval of the sterilization petition was a judicial act," entitling him to immunity from liability. *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099, 1107 (1978).

Like lawyers, judges are generally immune to civil rights actions under §1983 unless they conspire to commit an illegal act that is not an official judicial act within the judge's statutory jurisdiction. While a judge may not be held civilly accountable under §1983, a judge is still subject to criminal prosecution as are other citizens. *Dennis v. Sparks,* 449 U.S. 24, 66 L.Ed.2d 185, 101 S.Ct. 183 (1980). In *Dennis,* the court also held that attorneys can be held accountable under §1983 for conspiring with a judge to bribe the court and that even though the judge is immune from prosecution under that particular statute, the fact that the attorney has conspired with the judge, a public official, satisfies the color-of-law requirement necessary to sustain the action against the attorney. In *Stump, supra,* the Supreme Court found that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time the judge took the challenged action he or she had jurisdiction over the subject matter. The Court added that the scope of the judge's jurisdiction must be construed broadly when the issue is the immunity of a judge. 98 S.Ct. at 1105.

The simple act of ordering the circuit clerk to serve a subpoena will constitute action under color of state law to perfect a §1983 claim against an attorney. *Timson v. Weiner,* 395 F.Supp. 1344 (S.D. Ohio 1975).

In *Raitport v. Provident National Bank,* 451 F.Supp. 522 (E.D.Pa. 1978), a prosecutor was found to have absolute immunity for his decision not to file charges at the request of a property owner against a bank that foreclosed on the property owner's mortgage.

## IV. DEFENSES AND PRIVILEGES APPLICABLE TO ACTIONS BY NON-CLIENTS

### A. [3.23] Investigation

Illinois recognizes that the responsibility our law places on an attorney to make reasonable inquiry into the germane facts of a potential claim requires that the law protect such investigations. *See Holmes v. Williamson,* 33 Ill.App.2d 458, 178 N.E.2d 700 (4th Dist. 1962).

The investigation complained of in *Holmes* involved writing to a sheep broker to ask the weight and net sales price of sheep delivered there by their owner, a lawyer, who had agreed to pay the investigating lawyer's client one third of the net sales proceeds in exchange for tending the sheep. The appellate court castigated the plaintiff attorney, saying, among other things:

> **The search for facts, pertinent to an issue, is the search for the truth of that issue, which is the goal our profession must constantly pursue. To say that the letter here complained of imports or implies anything derogatory, defamatory or libelous about or concerning the plaintiff, or to say that it exceeded defendant's responsibility to his client, is utterly fantastic. A brother attorney, of all people, should have realized this.** 178 N.E.2d at 702.

### B. [3.24] Judicial Proceedings Privilege

In *Macie v. Clark Equipment Co.,* 8 Ill.App.3d 613, 290 N.E.2d 912 (1st Dist. 1972), Macie sued Clark Equipment and its attorney for what were perceived as libelous statements made in four exhibits to Clark's complaint. The trial court granted Clark's motion to dismiss because the allegedly libelous statements were part of a judicial proceeding. The appellate court, citing *Parker v. Kirkland,* 298 Ill.App. 340, 18 N.E.2d 709 (1st Dist. 1939), declared that "[i]t is well settled in our law that pertinent or relevant statements, written or oral, made in a judicial proceeding are absolutely privileged." 290 N.E.2d at 913.

However, the defense is not actually absolute. The court must determine in each such case whether the allegedly libelous statements were pertinent or relevant to the judicial proceedings in which they were made. *Macie, supra,* 290 N.E.2d at 914, citing *Baker v. S.A. Healy Co.,* 302 Ill.App. 634, 24 N.E.2d 228 (1st Dist. 1939). *See also Chas. Todd Uniform Rental Service Co. of Kentucky v. Klysce,* 30 Ill.App.2d 274, 174 N.E.2d 570 (4th Dist. 1961). All doubts are resolved in favor of relevancy or pertinency. *Macie, supra,* 290 N.E.2d at 914, citing *Harrell v. Summers,* 32 Ill.App.2d 358, 178 N.E.2d 133 (4th Dist. 1961). Although a party may not introduce inflammatory matters into a judicial proceeding entirely unrelated to the litigation, that party is not answerable for those volunteered or included in his or her pleadings if they have any bearing on the subject at issue. *Macie, supra,* 290 N.E.2d at 914, citing *Talley v. Alton Box Board Co.,* 37 Ill.App.2d 137, 185 N.E.2d 349 (4th Dist. 1962).

### C. [3.25] Immunity for Out-of-Court Defamation

In *Weiler v. Stern,* 67 Ill.App.3d 179, 384 N.E.2d 762, 23 Ill.Dec. 855 (1st Dist. 1978), the privilege of extrajudicial immunity to defamation was applied to a situation in which the party allegedly defamed was both an opponent and a former client. The plaintiff had been a partner in a partnership represented by the defendant attorney. When the plaintiff left the partnership, the defendant attorney continued to represent the partnership. The allegedly defamatory comments arose in the context of settlement negotiations with the former client, now opponent.

The court found that as long as the allegedly defamatory out-of-court statement was pertinent to the pending litigation, there was no reason to limit the privilege to formal pleadings and in-court statements.

The same result obtains with a communication necessarily preliminary to a quasi-judicial proceeding (*Parrillo, Weiss & Moss v. Cashion,* 181 Ill.App.3d 920, 537 N.E.2d 851, 130 Ill.Dec. 522 (1st Dist. 1989)) and to out-of-court communications between attorneys representing different parties suing the same entities (*Libco Corp. v. Adams,* 100 Ill.App.3d 314, 426 N.E.2d 1130, 55 Ill.Dec. 805 (1st Dist. 1981)).

The privilege affords complete immunity, irrespective of the attorney's knowledge of the statement's falsity or the attorney's motives in publishing the defamatory matter, when the statement is pertinent to pending litigation or required by federal law. *Weber v. Cueto,* 209 Ill.App.3d 936, 568 N.E.2d 513, 517, 154 Ill.Dec. 513 (5th Dist. 1991), citing RESTATEMENT (SECOND) OF TORTS §592A (1977). See also RESTATEMENT §586, cmt. a.

All doubts are resolved in favor of a finding of pertinence to the pending litigation. *See Skopp v. First Federal Savings of Wilmette,* 189 Ill.App.3d 440, 545 N.E.2d 356, 361, 136 Ill.Dec. 832 (1st Dist. 1989). The determination of pertinence is a question of law for the court. *Macie v. Clark Equipment Co.,* 8 Ill.App.3d 613, 290 N.E.2d 912, 913 (1st Dist. 1972).

If, however, the defamatory statements have no pertinence or connection with the pending litigation, then the privilege is not available. See RESTATEMENT §586, cmt. c.

In *Golden v. Mullen,* 295 Ill.App.3d 865, 693 N.E.2d 385, 390, 230 Ill.Dec. 256 (1st Dist. 1997), the court, citing *Weber, supra,* stated:

> **The privilege is predicated on the tenet that although defendant's conduct is otherwise actionable, because he is acting in furtherance of some interest of social importance, the communication is protected and no liability will attach, even at the expense of uncompensated harm to the plaintiff's reputation.**

*Golden* involved a non-client's action against his opposing attorney and extended the privilege to post-litigation communications. The *Golden* court reasoned:

> **An attorney must be free to discuss with the client the outcome of the litigation, future strategies, if any, and generally respond to inquiries from the client without fear of civil liability. Indeed, it is incumbent upon an attorney, following the conclusion of a legal proceeding or some portion thereof, to explain fully to the client what has occurred, why it has occurred, and the ramifications. Such explanations may require an assessment of the conduct of opposing counsel, other parties to the litigation, witnesses, and even the court. We believe, as the circuit court did, that there is a "tremendous public interest" in protecting and facilitating this type of open communication and commentary. Accordingly, we hold that the absolute privilege which attaches to defamatory statements made by an attorney incidental to a pending legal proceeding also applies to post-litigation defamatory statements made by an attorney to the client he or she represented in such proceeding.** 693 N.E.2d at 390.

In *Erickson v. Aetna Life & Casualty Co.,* 127 Ill.App.3d 753, 469 N.E.2d 679, 83 Ill.Dec. 72 (2d Dist. 1984), a derogatory statement about a chiropractor in the file of the defendant's insurer was not protected by judicial immunity. The court held that the statement was not privileged because it was made not in a legal proceeding but on a report that purported to be, but was not, a review by the plaintiff's peers in the chiropractic profession and was made not by an attorney but by the defendant insurance company. The court went on to state that any immunity would have been qualified and conditioned upon publication "in a reasonable manner and for a proper purpose." 469 N.E.2d at 686. To prove actual malice, the chiropractor did not have to "show malice in the moral sense of hate, vindictiveness or animosity but [could] prove a wanton disregard of the rights of others." 469 N.E.2d at 687. The question of whether actual malice was shown by clear and convincing evidence was a question for the trier of fact. *Id.*

### D. [3.26] Disclaimers

Attorneys can protect themselves in other jurisdictions from actions brought by non-clients by informing non-clients directly that they cannot rely on the attorney for advice or services. It is a far more prudent action for the attorney to make this statement in writing. *Banc One Capital Partners Corp. v. Kneipper,* 67 F.3d 1187 (5th Cir. 1995). A disclaimer may be a denial of an attorney-client relationship. *Williams v. Fortson, Bentley & Griffin,* 212 Ga.App. 222, 441 S.E.2d 686 (1994). It may also limit the ability of the plaintiff to rely on certain representations. In *Banc One, supra,* the court deemed the following language a sufficient disclaimer:

> **This opinion is furnished by us, as counsel for the company, to you, solely for your benefit, and we are not hereby assuming any professional responsibility to any other person whatsoever.** 67 F.3d at 1199.

### E. [3.27] Privilege To Advise

RESTATEMENT (SECOND) OF TORTS §772 (1979) affords a defense to a charge of interference with an advantageous relationship:

> **§772. Advice as Proper or Improper Interference.**
>
> **One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person**
>
> **(a) truthful information, or**
>
> **(b) honest advice within the scope of a request for the advice.**

RESTATEMENT §772, cmt. c, states:

> **The rule as to honest advice applies to protect the public and private interests in freedom of communication and friendly intercourse. In some instances the rule protects the public and private interests in certain professions or businesses. Thus**

> **the lawyer, the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert need this protection for the performance of their tasks. But the rule protects the amateur as well as the professional adviser. The only requirements for its existence are (1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest. If these conditions are present, it is immaterial that the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm caused to him by the advice.**

To state a cause of action that will survive application of this privilege, the complaint must on its face plead facts that lead to the conclusion that the defendant acted with malice. *Salaymeh v. InterQual, Inc.,* 155 Ill.App.3d 1040, 508 N.E.2d 1155, 108 Ill.Dec. 578 (5th Dist. 1987). In *Salaymeh,* the court found that the defendant attorney acted within the scope of the privilege and without malice when he advised his client to terminate a contract with the plaintiff.

In *Boyd Real Estate, Inc. v. Shissler Seed Co.,* 213 Ill.App.3d 648, 571 N.E.2d 1171, 157 Ill.Dec. 152 (3d Dist.), *appeal denied,* 141 Ill.2d 536 (1991), the court held that absent evidence of actual malice, the attorney's conduct in advising his client not to proceed with a real estate transaction was unqualifiedly privileged.

### F. [3.28] Incidental Benefit

This chapter's discussion of liability to non-clients comes full circle with a corollary to the third-party beneficiary doctrine that serves as a defense to such actions.

At times, the benefit a third-party receives from the actions of a lawyer may exceed that received by the lawyer's client. An incidental benefit, however, does not suffice to impose a duty on an attorney to a third party. *See Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville,* 261 Ill.App.3d 750, 633 N.E.2d 1267, 199 Ill.Dec. 276 (5th Dist. 1994); *Schechter v. Blank,* 254 Ill.App.3d 560, 627 N.E.2d 106, 193 Ill.Dec. 947 (1st Dist. 1993); *Orr v. Shepard,* 171 Ill.App.3d 104, 524 N.E.2d 1105, 121 Ill.Dec. 57 (1st Dist. 1988); *York v. Stiefel,* 99 Ill.2d 312, 458 N.E.2d 488, 76 Ill.Dec. 88 (1983); *Pelham v. Griesheimer,* 92 Ill.2d 13, 440 N.E.2d 96, 64 Ill.Dec. 544 (1982).

# 3S Attorney Liability to Non-Clients

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## II. Common-Law Liability to Non-Clients

B. The Rise of the Third-Party Beneficiary
   1. [3S.4] Illinois' Adherence to the Intended Third-Party Beneficiary Rule
   4. [3S.6A] Exception to Statutes of Limitation and Repose: Two Years After Death of Client (New Section)

F. [3S.10] Successors in Interest

I. [3S.13] Aiding and Abetting Client Fraud or Fiduciary Breaches; Lawyer Participation in Civil Conspiracy

## II. COMMON-LAW LIABILITY TO NON-CLIENTS

### B. The Rise of the Third-Party Beneficiary

#### 1. [3S.4] Illinois' Adherence to the Intended Third-Party Beneficiary Rule

*Add after the first full paragraph on p. 3-10:*

*Grimes v. Saikley*, 388 Ill.App.3d 802, 904 N.E.2d 183, 328 Ill.Dec. 421 (4th Dist. 2009), reinforces Illinois' view that lawyers for estate executors will not have tort duties to adversarial beneficiaries. The plaintiffs contracted with the public administrator and his lawyer to close their deceased father's estate. The administrator filed a final report after the plaintiffs reached property distribution agreements with various family members. The plaintiffs then sued the lawyer for malpractice, asserting he negligently failed to protect the estate against waste and failed to recover estate assets. Relying on *Estate of Lis, supra*, the court said the plaintiffs were intended third-party beneficiaries but the defendant lawyer owed them no duties because the relationship had become adversarial. In that circumstance, the defendant attorney's duty ran only to the public administrator. 904 N.E.2d at 194 – 196.

#### 4. [3S.6A] Exception to Statutes of Limitation and Repose: Two Years After Death of Client

*New section:*

In the last two years, the Supreme Court and appellate courts have reviewed cases involving 735 ILCS 5/13-214.3 and the "death of the client" exception to its limitations and repose periods.

The limitations period requires an attorney malpractice lawsuit to be brought within two years of the date when the plaintiff knew or should have known of the injury. 735 ILCS 5/13-214.3(b). The repose period cuts off liability at six years from the date of the negligent act or omission. 735 ILCS 5/13-214.3(c).

Section 13-214.3(d) is an exception to both limitations and repose periods. It provides that if the injury does not occur until the client's death, the lawsuit may be filed within two years of the client's death unless one of the following happens during the two-year period: (a) letters of office are issued; or (b) the client's will is admitted to probate. If one of those events happens, the lawsuit must be filed before the statutory deadline for filing claims against the estate, or before the statutory deadline for filing a will contest claim, whichever is later. 735 ILCS 5/13-214.3(d).

In *Wackrow v. Niemi*, 231 Ill.2d 418, 899 N.E.2d 273, 326 Ill.Dec. 56 (2008), the plaintiff sued her brother's attorney for failing to ensure he owned the house his will bequeathed to her. It was only after her brother's death that the lawyer and the plaintiff discovered the house's ownership was in a trust. The alternative gift was $300,000. When the estate refused to give plaintiff the house or the money, she filed suit. The plaintiff's theory of negligence was that a reasonably diligent search would have shown the trust's ownership. Letters of office were issued and the will admitted to probate on October 23, 2002. The plaintiff filed her lawsuit on December 27, 2004.

The defendant attorney moved for dismissal, arguing the suit was time-barred under §13-214.3(d). The plaintiff argued §13-214.3(d) added time to the two-year limitations period in cases in which the client's death reveals the attorney's negligence and causes the injury. The Supreme Court rejected this argument, holding that in the "client's death" circumstance §13-214.3(d) applies instead of, not in addition to, the limitations and repose periods in §§13-214.3(b) and 13-214.3(c). Because there was no injury until the decedent's death, §13-214.3(d) applied. The claim asserted negligence in the drafting of an amendment to a trust. The decedent could have changed or revoked the amendment at any time and thus no injury could have occurred until his death. 899 N.E.2d at 278.

The will was filed and letters of office issued on October 23, 2002. As the Probate Act imposes a six-month time limit for claims against the estate or a will contest, the plaintiff had only until April 23, 2003 to file a complaint for malpractice against her brother's lawyer. Thus, her December 27, 2004 complaint was properly dismissed as time-barred. 899 N.E.2d at 279 – 280.

*Snyder v. Heidelberger*, No. 2-08-1061, 2009 WL 3217572 (2d Dist. Oct. 6, 2009), was the follow-up case to *Wackrow* and further expounds on how Illinois courts will construe §§13-214.3(b), 13-214.3(c), and 13-214.3(d). In 1997, Wilbert Snyder retained the defendant lawyer to convey Wilbert's house to himself and his wife in joint tenancy. The lawyer prepared a quitclaim deed conveying the house to Wilbert and Judith, his wife. But the quitclaim deed conveyed nothing because the house was in a land trust. Wilbert died on December 26, 2007. On Wilbert's death, the land trust gave all of the beneficial interest in the house to Wilbert's son. Judith was eventually evicted from the house. She filed her complaint for attorney malpractice on February 28, 2008.

The trial court dismissed the malpractice claim as time-barred under the six-year repose period, holding that the plaintiff was injured in 1997 when the allegedly defective quitclaim deed was drafted and signed. The trial court reasoned that the intent of the quitclaim deed was to give the plaintiff an interest in the house in 1997. Because the quitclaim deed was ineffective, the plaintiff was denied the interest in the house which would have been given to her in 1997, not on Wilbert's death ten years later. Thus, the trial court concluded the alleged negligence happened in 1997 (when the deed was drafted and executed), not in 2007 (when Wilbert died).

The plaintiff's appeal contended the trial court should have applied §13-214.3(d) and that *Wackrow* governed the result. The defendant lawyer argued *Wackrow* was different because there, the client intended conveyance only at his death. Here, the quitclaim deed was to confer property interests immediately on its execution in 1997 and did not require the client's death to take effect. The appellate court said this was a distinction without a difference and "confuse[d] the potential for an injury with an actual injury." 2009 WL 3217572 at *3. The point of *Wackrow* was that the attorney's error "could be remedied at any time" while the client was alive by having the client "do something" to effect the intended result of conveying the interest in the house. *Id.* The defective instrument failed to yield the intended result, and "that failure could have been remedied by having the client 'do something', which was possible at any time before he died." *Id.* It held that the plaintiff suffered no injury until after Wilbert's death. The complaint, filed three months after his death, was timely. 2009 WL 3217572 at **3 – 4.

*Wackrow* and *Snyder* teach the necessity of good title searches, and in making sure the client understands and does all that is necessary to effect the transfer or gift. The practitioner must heed the duties to the intended beneficiaries and must also remember they present a potential for "long tail" liability.

### F. [3S.10] Successors in Interest

*Add at the end of the section:*

The First District took another step toward allowing successors in interest to sue the predecessor's lawyers in *Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill.App.3d 1068, 911 N.E.2d 1073, 331 Ill.Dec. 843 (1st Dist. 2009). Assignments of legal malpractice claims will be allowed if they are part of a larger business transaction and the assignees have close business relationships with the original owners of the malpractice claim. In *Learning Curve*, the plaintiff was found liable for misappropriating a trade secret and settled the case before a retrial on a punitive damages claim. The plaintiff then sued its predecessor's trial lawyers for allegedly (1) advising trial rather than settlement and (2) grossly underestimating the potential adverse trial verdict. In the meantime, the plaintiff merged with RC2 and bought out some of its shareholders. In a written escrow agreement, RC2 and the plaintiff agreed to pay 90 percent of the malpractice litigation's proceeds to the former shareholders. RC2 and the plaintiff also agreed to cede control of the lawsuit to the shareholders if they believed RC2 and the plaintiff had not used reasonable commercial efforts to pursue the malpractice claim. The escrow agreement disclaimed any label of "assignment" of the malpractice claim.

The defendants moved for dismissal, contending the shareholders were assignees and thus not proper plaintiffs in a legal malpractice case. The appellate court held the agreement was an assignment despite the labels the parties chose to use. However, the assignment to the shareholders, and their assertion of the malpractice claims, did not violate public policy. The malpractice claim was a minor part of a much larger commercial transaction. The assignees were formerly closely related to and involved with the predecessor corporation. They were not unrelated third parties or strangers to the attorney-client relationships. Rather, they were individual former shareholders who had actually suffered the losses due to the alleged negligence. Under these specific circumstances, public policy was not a bar to the malpractice claim. 911 N.E.2d at 1081 – 1082.

The case presents an interesting fact pattern showing the perils of settlement negotiations. In the underlying trade secret litigation, Learning Curve offered $225,000 to settle in response to a $350,000 demand. After a trial and appeal, having been held liable for compensatory damages and facing a retrial on punitive damages, Learning Curve calculated its potential liability for compensatory damages alone at $6 million. Learning Curve ultimately paid over $11.1 million to settle the trade secret lawsuit.

## I. [3S.13] Aiding and Abetting Client Fraud or Fiduciary Breaches; Lawyer Participation in Civil Conspiracy

*Add at the end of the section:*

In *Grimes v. Saikley*, 388 Ill.App.3d 802, 904 N.E.2d 183, 328 Ill.Dec. 421 (4th Dist. 2009), the plaintiffs sought recovery from attorney Saikley for the tort of aiding and abetting. The trial court dismissed the claims. The Fourth District upheld the dismissal because none of the alleged conduct demonstrated the lawyer was "regularly aware of [his] regular role" in "tortious activity" or that he "substantially assisted in" a wrongful or tortious act. 904 N.E.2d at 196. The plaintiffs alleged the lawyer (1) knew that the widow's family had improperly taken estate property; (2) knowingly allowed the family to plunder estate assets and intentionally refused to do anything to recover them; (3) told family members to take possession of estate property; and (4) directed police officers not to intervene in the family's theft of estate assets. None of this conduct stated a cause of action for the tort of aiding and abetting. Moreover, the lawyer had "no unilateral authority to direct police officers to do or abstain from doing anything." 904 N.E.2d at 197.