



Attorney Malpractice After *Schneider v. Finmann*

BY STEPHEN HOCHHAUSER, ESQ.

Introduction

On June 17, 2010, the New York Court of Appeals relaxed New York's "privity rule" affecting claims of attorney-malpractice so as to allow personal representatives of estates to sue an attorney-estate planner whose negligence caused the estate to suffer damages such as "enhanced estate tax liability." *Schneider v. Finmann*.¹ The decision noted that New York had theretofore been among a minority of states that had required strict privity so as to protect lawyers from claims by anyone other than the clients they represented.²

After listing the cases from those jurisdictions that had relaxed the rule, the Court stated: "We now hold that privity, or the relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." The Court relied on a 2006 Texas case, *Belt v. Oppenheimer, Blend, Harrison & Tate*,³ which stated that the personal representative "stands in the shoes of the decedent," and can maintain a malpractice action on behalf of the estate.⁴

The *Schneider* decision also noted that Estates, Powers, Trusts Law (EPTL) § 11-3.2(b) supported relaxation of the strict privity rule in that it provided that "no cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed," and endowed the personal representative of the decedent with the right to bring or continue an action for such injury.

The *Schneider* decision came up on appeal from the granting of a motion to dismiss the complaint. Thus, the decision simply held that the plaintiff could proceed with the complaint on behalf of the estate. The opinion provided scant analysis of the various issues that will inevitably have to be addressed as a result of the change in the law that the Court announced.

One decision in 2001 by the Hawaii Supreme Court, *Blair v. Ing*,⁵ which is cited in the *Schneider* decision, discussed many of the legal and public policy issues involved

* Since 1988 Stephen Hochhauser has served as Of Counsel to Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn, LLP, where his concentration has been on trust, estate and commercial litigation.

in relaxation of the strict privity rule. New York Courts will ultimately have to face those issues on a case by case basis unless the Legislature steps in and sustains, rejects or modifies the scope of this new right.

The reference to the *Blair* decision by the *Schneider* court was in a string cite of cases from other jurisdictions that allowed non-clients to sue attorneys, and was not an indication that *Blair* has somehow been adopted by the Court of Appeals as the law in this State. Indeed, *Blair* was an action by co-trustees who were also beneficiaries of the trust, and *Schneider* expressly stated that strict privity remains a bar against malpractice claims from beneficiaries and other third-party individuals, “absent fraud or other circumstances.” The *Schneider* decision provided no hint as to what was meant by “other circumstances.”

Nonetheless, since *Blair* contains a comprehensive discussion of many of the issues, for now, attorneys would be well-advised to study its discussion of the pros and cons of each approach to each of the questions that will have to be faced from now on about this.

Strict privity appears to have first been noted in an 1879 decision by the U.S. Supreme Court in *National Sav. Bank v. Ward*.⁶ A 1961 California decision, *Lucas v. Hamm*,⁷ is the first State case that rejected prior case law requiring strict privity. The *Lucas* case involved an action by trust beneficiaries complaining that they were damaged because their bequest was found to violate California’s rules against perpetuities and restraints on alienation.

However, the *Lucas* decision did not permit the plaintiffs to proceed with their claim because it found that the attorneys’ mistake did not amount to negligence because the rule against perpetuities was so complex that even skilled attorneys might not avoid its restrictions. Thus, the statement that strict privity was no longer going to be applied in California was actually *dictum*.⁸

The *Lucas* decision stated that “public policy” controlled whether an attorney-draftsperson would be held liable to a third party not in privity with the attorney and listed six factors that had to be considered: 1) the extent to which the transaction was intended to affect the plaintiff, 2) the foreseeability of harm, 3) the degree of certainty of the harm suffered, 4) the closeness of the connection between the defendant’s conduct and the injury, 5) the policy of preventing future harm, and 6) whether imposing liability placed an undue burden upon the legal profession.

The *Blair* opinion endorsed those six factors and proceeded to discuss whether courts should approach the issue of attorney liability to non-clients utilizing the case law applicable to third-party beneficiaries of contracts on the theory that a will or trust was primarily designed to benefit the non-client beneficiaries. *Lucas* approved both negligence and third-party beneficiary contract theories as bases for recovery by non-clients.

Two other cases cited in the *Blair* opinion, a 1995 Kansas decision,⁹ and a 1989 Virginia case,¹⁰ both stressed the third-party beneficiary concept as a reason for the relaxation of the strict privity rule. *Blair* then noted that Pennsylvania¹¹ and Maryland¹² had rejected the third-party beneficiary contract rationale in favor of the negligence rationale. The decision also discussed a law review article¹³ dealing with the contract-negligence theories before deciding that in Hawaii, if a duty of care was found to exist

between the attorney and the non-client, the non-client could proceed under either a negligence or third-party beneficiary contract theory, and punitive damages could be recovered if the attorney was found to have acted in a willful, wanton, malicious or fraudulent manner.

Blair then went on to discuss the circumstances under which a duty of care should be found, noting the natural reluctance to impose a new duty unless there were compelling reasons. The decision harked back to the six factors set forth under the *Lucas* case, and considered whether relaxation of the privity rule would create unlimited liability to an unlimited class of individuals that would unduly burden the legal profession.

Blair then discussed whether it would apply the same rule prohibiting the introduction of extrinsic evidence that was applicable in cases involving a collateral attack against the will, and concluded that it should follow the decision in an Illinois case, *Ogle v. Fulton*,¹⁴ that found such a rule inappropriate in a malpractice case because the claim did not affect the will itself, and thus did not pose a risk that the testator's intent would be frustrated, which was the basis for the exclusionary rule in will contests.¹⁵

The next issue discussed in *Blair* was two approaches to the Statute of Limitations, namely the "discovery rule" which is common in medical malpractice cases, and the "accrual rule" which is generally applied in legal malpractice cases. The *Blair* opinion discussed the Florida view¹⁶ that clients are laymen who are not likely to recognize that an attorney has committed an error, and opted for the "discovery rule."

Another question that might arise in future cases is the standard for the burden of proof. In 1995, the New Jersey Supreme Court¹⁷ adopted a rule akin to the New York Court of Appeals' decision dealing with accountants' negligence,¹⁸ and permitted non-clients to sue where the attorney knew or should have known that the non-client would rely on the attorney's representation,¹⁹ and the plaintiff was not remote from the attorney so as to warrant protection. However, the New Jersey Court imposed a clear and convincing standard of proof for non-client plaintiffs, whereas the usual preponderance standard was applicable in malpractice actions commenced by clients.

I. Pleading a Cause of Action for Malpractice in New York

It is well settled that there is a tripartite test that legal malpractice complaints must pass in order to withstand a motion to dismiss under CPLR § 3211(a)(7).²⁰ The complaint must assert facts showing that: 1) the attorney was negligent, *i.e.*, that he or she failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community, 2) the attorney's negligence was the proximate cause of the harm suffered, and 3) actual damages were suffered by the client.²¹ Potential, speculative or anticipatory damages will not do.²²

Thus, if a New York draftsman's error fails to result in pecuniary harm to the estate, then the estate has no cause of action for malpractice, and a beneficiary who may have been harmed, *e.g.*, by being erroneously omitted from the will or trust, may not be able to assert a viable claim because the strict privity rule would still apply under *Schneider*.

II. Statute of Limitations for Legal Malpractice in New York

Under CPLR § 214(6), an action to recover damages for legal malpractice must be commenced within three years from accrual. However, since the cause of action does not accrue until the client suffers and can plead actual damages proximately caused by the attorney's negligence, that means that there is a practical merger of the accrual and discovery theories because the action cannot accrue until "all the facts necessary to the cause of action have occurred *and an injured party can obtain relief in court* (emphasis added)."²³

Tolling of the statute of limitations by continuous representation with regard to the matter out of which the malpractice arose, is generally applicable to attorney malpractice claims.²⁴ However, since the non-client plaintiff does not normally have a relationship with the attorney in the first place, an issue that must be visited is whether the non-client, *i.e.*, the personal representative, will be entitled to "borrow" the client's continued representation by the same attorney so as to toll the statute. This is especially relevant where the attorney-draftsperson is engaged to offer the will for probate, and the personal representative may not discover the negligence until the estate tax audit or until the accounting, which may well be more than three years after probate.

As a practical matter, however, since the claim does not accrue until the plaintiff has suffered actual damage, tolling on account of continuous representation is not likely to be a significant issue where the negligence relates to estate tax planning.

The more serious question is posed where there is a lengthy delay between the date of the will and the date of death, at which time the terms of the will are revealed and the negligence as well as damages are first likely to be discovered. One of the key factors in the 1961 *Lucas* case, *supra*, was whether imposing liability placed an undue burden on the legal profession. Is it fair to the attorney or his or her law firm to face liability for negligence harking back to the date the will was signed, when the damage, and therefore the accrual of the cause of action, may not occur for many years, at which time the draftsperson may no longer be alive; his or her estate may have long since been distributed; his or her law firm may no longer be in existence; the firm's records identifying its malpractice carrier and the terms of the policy may not be readily discoverable; and the draftsperson's notes and records reflecting that the testator elected to forego tax advantages in favor of other considerations may no longer be in existence?

Additionally, gift and estate tax laws undergo changes every few years, and the ultimate pecuniary harm is likely to be in the form of additional estate or gift taxes or diminished estate or gift tax deductions. Now that strict privity has been relaxed in New York, the courts will have to determine whether attorneys have to notify clients of changes in the tax laws even if the testator-client may not have had any further professional dealings with the draftsperson following the execution of the will.

In situations where the testators' family and financial circumstances have changed to the point where the will is no longer appropriate for tax purposes, it is unlikely that the courts will charge the draftsperson with prescience. Even if the attorney learns of the change in circumstances, will he or she be held to have a duty to advise the testator to review the will? Some firms send notices to their will-clients advising them of

the possible need to review their estate plans when the laws change. An issue is surely going to arise as to whether or under what circumstances there is a duty to do so.

Malpractice carriers strongly recommend disengagement letters at the termination of the services for which the attorney was engaged in order to protect against the attorney's having any continuing duty to the client. While that is very sound advice to protect against claims by the client, how does one disengage from the nominated executor? While clients should solicit consent to serve from the nominated executor, especially when the nominee is a bank, successors may not know that they might become the personal representative, and the attorney may not be free to communicate with the successor to advise the successor regarding changes in the tax law without violating the attorney-client privilege.²⁵

III. The Attorney-Client Privilege

If a client sues his attorney for malpractice, the Second Department in 1983 deemed it a waiver of the privilege to the extent that the attorney needed to reveal confidential communications for his or her defense.²⁶ That case however, held that although there was a waiver of the privilege with respect to communications with the defendant attorney, there was no waiver as to communications between the client and the client's successor attorney when the defendant-attorney sued the successor attorney as a third-party defendant.

However, if a non-client, the personal representative, sues the attorney for malpractice, the Courts will have to determine if the privilege is waived under that circumstance. Normally, once a client dies, the privilege cannot be waived.²⁷

On the other hand, the personal representative of a deceased person can waive the privilege in order to benefit the decedent's estate.²⁸ In *Schneider*, the damage consisted of enhanced estate taxes which harmed the estate and its beneficiaries. The holding was that the estate could sue but that the beneficiaries could not.²⁹ Thus, in an action such as *Schneider*, commenced by the personal representative against the attorney-draftsperson for negligent drafting of the will, the personal representative could waive the privilege only if it would benefit the estate itself, but the attorney defendant might not be able to compel discovery of privileged communications if it only served to benefit the attorney's defense and did not benefit the estate.³⁰

IV. The Dead Person Statute

The Dead Person Statute, CPLR § 4519, is an even more severe problem for attorney-estate planners being sued by the executor. Waiver is only deemed to occur if the executor testifies as to the particular transaction. However, by merely introducing the will or trust and the tax assessments, and having an independent witness evaluate the estate planning flaws, the executor is not deemed to have testified to the transaction so as to open the door to the attorney to provide an explanation that includes discussions with the decedent.³¹

Whether courts will deem the executor's standing in the shoes of the decedent to assert malpractice to also permit the attorney to provide an explanation is another matter that will have to be resolved in future cases or by the Legislature.

V. What Constitutes Negligent Drafting

The only basis for pleading malpractice against a draftsman is where the estate suffered damages caused by errors or omissions. Tax planning, however, is replete with personal choices made by the testator, by the personal representative, and by the surviving spouse. Every tax planning choice produces results that may benefit one class of beneficiaries to the detriment of another, and involve the timing of taxes.

Some testators may not want to minimize estate taxes if it means that bequests to their children or grandchildren will be delayed until the surviving spouse dies. Moreover, when the remaindermen are persons for whom the surviving spouse has no love or affection, *i.e.*, children of the testator's first marriage, the surviving spouse may well select estate tax options despite the adverse tax consequences to those remaindermen.

With *Schneider*, attorneys now have to be especially diligent in showing that they explained all of the possible scenarios to the testator and that the estate file contains a record reflecting that they provided the testator with correct advice such that any adverse tax consequences were the result of informed choices made by the testator, the nominated personal representative, or the surviving spouse.

While *Schneider* only permits suit by the personal representative, ultimately there will be an accounting, whether informal or judicial. If the personal representative has refrained from suing the draftsman, the beneficiaries may assert objections to the accounting if it turns out that the estate paid more in taxes than it should have because of the draftsman's error. *Schneider* may well result in protective suits by personal representatives solely to avoid such objections.

VI. New York State Bar Association Ethics Opinion 865 (5/10/11)

The draftsman is often selected by the personal representative to act as the attorney for the estate. Following the decision in *Schneider*, the Bar Association Committee on Professional Ethics issued an opinion regarding conflicts of interest under Rule 1.7 and its application to the selection of estate counsel who is now a potential target of a malpractice action by the personal representative.

Rule 1.7(a) prohibits lawyers from representing clients where there is a "significant risk" that the lawyer's "professional judgment... will be adversely affected by the lawyer's own financial, business or other personal interest." Rule 1.7(b) then states that notwithstanding a conflict of interest, the lawyer may represent a client if the "client gives informed consent, confirmed in writing," provided that the lawyer "reasonably believes" that he or she can provide "competent and diligent representation... [which] is not prohibited by law," and the matter does not involve the assertion of a claim in the same litigation by one client against another client.

The Committee's approach was to distinguish between three situations, namely where the lawyer: 1) "realizes" at the outset, 2) "does not perceive" at the outset, or 3) "comes to realize during the representation," that he or she "may have committed legal malpractice and that the executor would have a colorable claim." The Committee's conclusion was that, "in light of *Estate of Schneider v. Finmann*, a lawyer who prepared an estate plan for a client may agree to act as counsel to the executor after the client's

death, as long as the lawyer does not perceive a colorable claim for legal malpractice before or during the representation of the executor.” The Committee further concluded that if the lawyer does perceive a colorable claim, “then the conflict is nonconsentable, and the lawyer (and all other lawyers associated with his firm) must decline or withdraw from the representation, and the lawyer must inform the executor of the facts giving rise to the claim.”

Moreover, in cases where the draftsman is also the nominated executor, the facts may warrant an application by the beneficiaries to disqualify the attorney from securing letters, or at the very least, an application under SCPA § 702(8) or § 702(9) to secure limited letters to enable them to bring the malpractice action against the attorney on behalf of the estate.³²

Old comedy movie fans will recall Oliver Hardy repeatedly rebuking Stan Laurel, saying, “look at the mess you got us into,” whenever they found themselves in a terrible predicament. The Court of Appeals’ decision in *Schneider* can be viewed as having created a terrible mess that the Legislature or future cases will have to clear up.

Conclusion

Schneider may compel the Trust and Estate bar to face what other practitioners have been facing for some time, namely practicing defensive lawyering and treating clients and their heirs as potential future adversaries. We may have to start drafting much more elaborate engagement letters containing all sorts of self-serving protective statements even though it makes us uncomfortable when we have to ask long-time clients, who may be friends or neighbors, to sign or accede to what are essentially limitations on their right to sue us. Indeed, retainer agreements and engagement letters have already become so complex that we soon may have to recommend that our clients engage independent attorneys just to review the retainer agreements or engagement letters.

The *Schneider* decision calls to mind a 1902 Court of Appeals case³³ that refused to change the common law notwithstanding, the existence of a clearly compelling set of facts, stating that it was up to the Legislature to determine how and under what circumstances the law should be changed. That case involved a plaintiff whose photographic likeness was printed on bags of flour without her consent, and the Court declined to create a new tort, the invasion of her right of privacy. The opinion stated that if such a new right of privacy should become the law in New York, the Legislature should enact it, and the Governor should sign it into law. Articles 50 and 51 of the Civil Rights Law were, in fact, enacted in 1909 in response to the Court’s refusal to sustain the woman’s complaint, but the statute dealt with the narrow facts of the case, providing that the use for advertising or trade of someone’s name, portrait or picture without their consent was a misdemeanor (Article 50), and that the person whose name or picture was used could secure an injunction and recover damages from the user (Article 51).

A few years later, a Georgia court³⁴ allowed a plaintiff to prevail in an invasion of the right of privacy as a matter of common law without a legislative enactment.

Because New York's invasion of privacy law was governed by statute and was not developed on a case by case basis, the case law in New York has been more restricted than in other states where the common law was allowed to develop.³⁵

The beauty of the common law's case-by-case approach was its versatility, which is lacking in a statute enacted in response to a specific court decision.

Because the problems dealing with the application of the Statute of Limitations, the Attorney-Client privilege, the Dead Person Statute, and the potential unfairness of allowing actions against draftspersons that may have occurred many years before the decedent's death, in all likelihood, the Legislature will be asked to establish the parameters for future actions asserting attorney-malpractice in estate planning cases. The decision in *Blair* noted that California had codified the *Lucas* decision,³⁶ and that Maine had enacted a statute reinstating the "occurrence" rule, but exempting negligence in the drafting of wills from that change.³⁷

Time will tell whether the New York Legislature is up to the task of devising appropriate revisions to existing statutes dealing with the various issues that are likely to arise while still being mindful of the difficulties the legal profession may encounter under the new right created in *Schneider*. If not, then the Courts will have to deal with the matter on a case by case basis which may, in the long term, produce better law but, in the short term, could result in a "terrible mess."

Endnotes

1. 15 N.Y.3d 306, 308-9 (2010).

2. Alabama, *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002); Maine, *Nevin v. Union Trust Co.*, 726 A.2d 694 (Me. 1999); Maryland, *Noble v. Bruce*, 349 Md. 730 (Md. 1998), Ohio, *Simon v. Zipperstein*, 32 Ohio St.3d 74 (1987); and Nebraska, *Lilyhorn v. Dier*, 335 N.W.2d 554 (Neb. 1983).

3. 192 S.W.2d 780, 787 (2006).

4. Compare, *Good Old Days Tavern, Inc., v. Zivirn*, 259 A.D.2d 300 (1st Dept. 1999), where the principal of a corporation who hired an attorney to represent the corporation was allowed to bring a cause of action for malpractice on behalf of the corporation where he was the sole shareholder and president and earned his livelihood from the corporation's business.

5. 95 Hawaii 247 (2001).

6. 100 U.S. 195.

7. 364 P.2d 685 (1961).

8. The holding in the case affirmed the dismissal of the complaint on grounds other than strict privacy, namely that the negligence and breach of third-party beneficiary contract claims arose out of California's rules against perpetuities and restraints on alienation on which the trust was held to be invalid, but that the law was so complex and difficult that ordinary attorneys could err without being negligent.

9. *Donahue v. Shugart*, 900 S.E.2d 624, 629 (1995).

10. *Copenhaver v. Rogers*, 384 S.E.2d 593, 596 (1989).

11. *Guy v. Liederbach*, 459 A.2d 744 (1983).

12. *Noble v. Bruce*, 709 A.2d 1264, 1275-76 (1998).

13. *Begleiter, Attorney Malpractice in Estate Planning*, 38 U. of Kan. L. Rev. 193 (1989).

14. *Ogle v. Fuiten*, 466 N.E.2d 224, 277 (Ill. 1984).

15. Citing *Hamilton v. Needham*, 519 A.2d 172 (D.C. 1986).
16. *Downing v. Vaine*, 228 So.2d 622, 625 (Fla. Dist. Ct.App. 1969).
17. *Petrillo v. Bachenberg*, 139 N.J. 432 (1995).
18. *Credit Alliance Corp. v. Arthur Anderson & Co.*, 65 N.Y.2d 536 (1985).
19. For example, where a contract requires that an opinion letter be presented from one of the parties' attorneys regarding the validity of that party's title. In such a case, the recipient surely is likely to rely on the lawyer's opinion even though the recipient is not the lawyer's client.
20. 76 NY Jur2d "Malpractice" § 38.
21. *Arday Industries, Inc. v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300 (2001); *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dept. 2005).
22. *Giambrone v. Bank of New York*, 253 A.D.2d 786, 787 (2d Dept. 1998).
23. *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994) (quoted with approval in *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002)). See also *Phillips-Smith Specialty Retail Group II, LP v. Parker Chapin Flattau & Klimpl, LLP*, 256 A.D.2d 208 (1st Dept. 1999).
24. *Shumsky v. Eisenstein*, 96 N.Y.2d 164 (2001).
25. CPLR § 4503. It is only after death that the attorney is allowed to disclose privileged communications with the testator, and then only in connection with an action involving the probate, validity or construction of the will.
26. *Jacobleff v. Cerrato, Sweeney and Cohn*, 97 A.D.2d 834 (2d Dept. 1983).
27. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *But see, People v. Vespucci*, 192 Misc.2d 685 (Co. Ct. Nassau Co. 2002).
28. *Mayorga v. Tate*, 302 A.D.2d 11 (2d Dept. 2002).
29. 15 N.Y.3d at 310.
30. See, *Mayorga v. Tate*, *supra.*
31. *Matter of Estate of Wood*, 52 N.Y.2d 139 (1981),
32. § 702(8) is used where the Court finds that the acting fiduciary cannot or should not act due to a conflict of interest, and § 702(9) is used where the Court finds that an action or proceeding against the fiduciary should be brought but the fiduciary has failed or refused to bring it.
33. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 545 (1902).
34. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).
35. See, *Ward v. Klein*, NYLJ November 16, 2005, p. 19 (NY Co. Sup. Ct.), dismissing an Article 51 cause of action by a woman whose photo likeness was used in a documentary film without her consent.
36. See, California Civ. Proc. Code § 340.6 (West 1982) (which codified the discovery rule, provided for a four year statute of limitations but tolled it *inter alia* until the plaintiff sustained an actual injury).
37. Me. Rev. Stat. Ann. Tit 14, § 753-A (Supp. 1999).