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# New York Attorney Malpractice Liability to Non-Clients: Toward a Rule of Reason & Predictability

Lucia Ann Silecchia\*

We now conclude that in circumstances such as these, a theoretical basis for liability against legal professionals can be presented.<sup>1</sup>

So said the New York State Court of Appeals in *Prudential Insurance Co. v. Dewey, Ballantine, Bushby, Palmer & Wood* as it addressed the question of the liability of New York's attorneys to those who are not their clients.<sup>2</sup> The decision of the court to consider the liability of New York attorneys to third parties reflects the latest stage in the state's attempt to define whether an attorney's duty should be extended to non-clients, or whether such third party liability conflicts with what has always been recognized as the attorney's primary loyalty, responsibility to the client.<sup>3</sup> Although New York courts until very recently clung to the conservative privity requirement for attorney liability, the *Prudential* case's "theoretical" liability makes this a question that warrants attention.<sup>4</sup>

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1. *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382, 605 N.E.2d 318, 319, 590 N.Y.S.2d 831, 833 (1992), *reconsideration denied*, 81 N.Y.2d 954, 613 N.E.2d 972, 597 N.Y.S.2d 940 (1993).

2. As of 1988, there were 81,698 attorneys in New York State. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 192 (1992).

3. See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1989) ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); see also DENNIS J. HORAN & GEORGE W. SPELLMIRE, JR., ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 1-3 (1989) ("The attorney's paramount obligation is to serve & carry out the intention of the client.").

4. The issue of attorney malpractice itself is an old one indeed. In *Allied Prod. Inc. v. Duesterdick*, 232 S.E.2d 774, 775 (Va. 1977), the Virginia Supreme Court

Paradoxically,<sup>5</sup> the nationwide debate on the privity question was indirectly ushered in by New York courts themselves in *MacPherson v. Buick*.<sup>6</sup> That case sounded the death knell for privity by abolishing it as a requirement for recovery in products liability actions.<sup>7</sup> Following *MacPherson*, courts began examining whether privity should continue to bar recovery in other circumstances. In addition to *MacPherson*, which helped define the rights of third parties in the negligence context, New York's nineteenth century decision in *Lawrence v. Fox*<sup>8</sup> also allowed third parties to recover on a contract theory as well.

Although neither *Lawrence* nor *MacPherson* involved attorneys, they established a framework for expanded liability. Inevitably, the question arose as to whether an attorney-client relationship should remain required before injured parties could recover against attorneys in tort or contract for failure to meet professional standards of competence in the performance of their duties. New York law, early on, laid the groundwork for both theories that could be used to justify third party recovery against attorneys.

Through the past few decades, as states addressed this question, many moved away from the strict privity doctrine.<sup>9</sup> They recognized that there may be circumstances where justice will best be served by allowing one other than a client to recover against a negligent attorney.<sup>10</sup> At the same time that this has

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claimed credit for deciding the nation's first legal malpractice case nearly two centuries before in *Stephens v. White*, 2 Va. (2 Wash.) 203 (1796).

5. See also Tom W. Bell, Comment, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1539 (1992) ("Ironically, the New York courts that launched the assault on the privity rule during Cardozo's tenure are today some of its last defenders.").

6. 217 N.Y. 382, 111 N.E. 1050 (1916).

7. *Id.* at 389-91, 111 N.E. at 1053.

8. 20 N.Y. 268 (1859).

9. See David J. Meiselman, *Attorney Liability to Third Parties*, N.Y. ST. B.J. 108, 141-42 (1981) ("It is fair to state that although the weight of authority may support the strict privity rule, the trend is to the contrary.") (emphasis added) (citations omitted). But see Elizabeth R. Lorton, Note, *Attorney Malpractice: Negligence and Liability to Third-Parties*, 6 GEO. J. LEGAL ETHICS 1097, 1106 (1993) ("[I]t appears that several jurisdictions are moving toward a more conservative position in determining attorney liability.").

10. See *infra* notes 37-69 and accompanying text. See also RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 7.10, at 879 (3d ed. 1989) ("[T]he vast majority of modern decisions have favored expanding privity beyond the confines of the attorney/client relationship where the plaintiff was intended to be the benefi-

been occurring, the percentage of malpractice claims being brought against attorneys by third parties has been steadily on the rise<sup>11</sup> as have the costs of malpractice insurance.<sup>12</sup> These

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ciary of the lawyer's retention."). For a compilation of cases that have adopted both views regarding the question of attorneys' third party liability, see Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client*, 61 A.L.R. 4TH 464 (1988 & Supp. 1993); Joan Teshima, Annotation, *Attorney's Liability to One Other Than Immediate Client for Negligence in Connection with Legal Duties*, 61 A.L.R. 4TH 615 (1988 & Supp. 1993).

11. The exact percentage of claims against attorneys by those other than clients is a subject of no clear consensus. See, e.g., MALLIN & SMITH, *supra* note 10, at 286 ("Over one-fifth of all claims brought against attorneys arising out of the rendition of legal services are brought by non-clients, typically by former adverse parties."); William H. Gates, *Lawyer's Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559, 559 (1986) ("12.4% of claims are made by non-clients."). Indeed, this is part of a growing increase in the overall number of malpractice claims being filed against attorneys. See Thomas W. Hyland, *Law Firms' Exposure to Third Parties—An Expanding Doctrine*, in LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 137 (ABA Standing Committee on Lawyers' Professional Liability 1992) ("In a recent survey conducted by the Lawyers' Liability Review, nearly 40% of the firms responding reported that legal malpractice claims had been filed against them within the preceding two years. Moreover, 60% of firms of 40 or more lawyers report claims of alleged malpractice."); Donna Gill, *Targeting Lawyers: Legal Mal in the '90's*, CHI. LAW., Sept. 1992, at 1 (citing Ronald E. Mallin's observation that the "recent law school grad can expect to be sued three times during his or her career."); Mary Ann Galante, *Malpractice Rates Zoom: Legal Insurance Crisis*, NAT'L L.J., June 3, 1985, at 1, 25 ("Nationwide, according to insurers, about 7 percent of lawyers are now defendants."); Cheryl Morrison, *Who Sues or Defends Attorneys*, NAT'L L.J., Mar. 28, 1983, at 1 ("One of every 20 American attorneys will be sued for malpractice this year . . ."); Douglas A. Cifu, *Expanding Legal Malpractice to Non-client Third Parties: At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 2 (1989) ("The most potentially explosive development in the field of legal malpractice is the expansion of the scope of liability of attorneys to those individuals other than the immediate client.") (quoting D. MEISELMAN, ATTORNEY MALPRACTICE LAW AND PROCEDURE, § 6:1, at 93 (1980)); ABA, ISSUES IN FORMING A BAR RELATED PROFESSIONAL LIABILITY INSURANCE COMPANY 120 (1989) ("Litigation is becoming a minefield . . ."). For a complete statistical review of the attorney malpractice situation, see generally ABA, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1989).

12. The rising costs of malpractice insurance was a significant issue at the time the *Prudential* case arose as well. See Edward A. Adams, *6 New Insurers Offer Malpractice Coverage*, N.Y. L.J., Oct. 22, 1990, at 1 (chronicling increase in legal malpractice costs for New York attorneys); Edward A. Adams, *Ripple Effects Seen from Kaye Scholer Suit*, N.Y. L.J., Mar. 4, 1992, at 1 ("Last October, a consortium of 21 large firms, including Kaye Scholer, saw insurance costs rise by an average of 25 percent . . ."); Edward A. Adams, *Premium Rise Hits Large Firms*, N.Y. L.J., Oct. 13, 1992, at 1 ("New York's largest firms have been forced to pay 10 to 20 percent more malpractice insurance. But measured by the cost per attorney, pre-

developments make this an issue of increasing importance both legally and financially.<sup>13</sup>

However, while New York may well have provided the impetus for other states to abolish privity in the area of attorney liability, New York courts stubbornly clung to the traditional rule that absent an attorney-client relationship there can be no liability.<sup>14</sup> However, with the recent admission by the Court of Appeals in *Prudential* that there is a "theoretical" possibility that attorneys may be liable to non-clients,<sup>15</sup> New York may be poised for a shift in its law.<sup>16</sup> Therefore, now is an appropriate time to consider precisely what direction New York courts should take if there is, in fact, to be a principled move toward expanded attorney liability to non-clients in either tort or contract.<sup>17</sup>

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mium increases actually range from 25 to 45 percent . . . ."); Nancy Zeldis, *New York Firms Are Biting the Bullet*, NAT'L L.J., Sept. 19, 1988, at 2 ("Legal malpractice insurance rates may have taken a nose-dive nationally, but New York's biggest firms are reporting rate increases of 40 percent as of October 1.").

13. Professor Stephen Gillers has identified three factors in the increase in actions against attorneys. See Stephen Gillers, *Ethics that Bite: Lawyers' Liability to Third Parties*, 13 LITIGATION 8, 9 (Winter 1987) ("First, lawyers are insured, and insurance companies can pay judgments. Lawyers are discovering that other lawyers can be attractive targets. . . . Second, lawyers often tread close to the line separating advisors from principles, making it difficult for them to invoke the status defense. . . . Third, and most important, the courts have been receptive to new, more expansive theories of liability in transactions where lawyers tend to congregate."). Although Professor Gillers directed his comments at malpractice actions generally, it seems likely that these same factors now make third party suits against attorneys more attractive as well.

14. See Bruce S. Ross, *Legal Malpractice in Estate Planning and Administration*, 18 ACTEC NOTES 248, 249 (1993) (indicating that Ohio, Missouri, Nebraska, Texas and Virginia share New York's preference for privity defense); Helen B. Jenkins, *Privity—A Texas Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 697-98 (1990) (acknowledging Missouri, Nebraska, New York, Ohio and Texas as "privity" states); Bell, *supra* note 5, at 1540 (identifying privity rule in Missouri, Nebraska, Ohio and Texas as being in line with New York's traditional view); see also Barbara Walker, Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48, 56-57 (1981) ("New York has continued to reject any relaxation of the privity requirement in the attorney-client relationship.").

15. *Prudential*, 80 N.Y.2d at 382, 605 N.E.2d at 320, 590 N.Y.S.2d at 833.

16. See *infra* discussion accompanying notes 275-83, discussing the impact the *Prudential* case has had thus far in New York's attorney liability jurisprudence.

17. As discussed later in this Article, the difference between these two forms of action has become one that is more semantic than substantive since, in most

This Article will address the question of attorney liability in New York.<sup>18</sup> It will begin with a brief introduction to the his-

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circumstances, the same course of conduct will give rise to either or both claims. See *infra* discussion accompanying notes 168-190.

18. This Article focuses on this issue under New York law only; however, many commentators have written about the issue generally. See, e.g., DAVID J. MEISELMAN, *ATTORNEY MALPRACTICE: LAW & PROCEDURE* 93-108 (1980); Lorton, *supra* note 9; Cifu, *supra* note 11; Dina L. Centifanti, Note, *Simon v. Zipperstein*, 17 CAP. U. L. REV. 371 (1988); Nancy Lewis, *Lawyers' Liability to Third Parties: The Ideology of Advocacy Reframed*, 66 OR. L. REV. 801 (1987); Gillers, *supra* note 13; John F. Cooper & Nathaniel B. Kidder, *Privy in Estate Planning Malpractice Actions: The Birth, Death, and Resurrection of a Concept*, 17 CUMB. L. REV. 1 (1986); Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DEPAUL L. REV. 41 (1986); Leslie L. Gardner, Comment, *Attorney Liability to Third Parties for Corporate Opinion Letters*, 64 B.U. L. REV. 415 (1984); David L. Dranoff, Comment, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 NW. U. L. REV. 633 (1982); Ellen S. Eisenberg, Note, *Attorney's Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982); John C. Cahill, Note, *Guy v. Liederbach: Expanding the Attorney's Duties Beyond the Limits of the Privy Requirement*, 11 CAP. U. L. REV. 643 (1982); Barbara M. Theberge, *Attorney Negligence in Real Estate Title Examination and Will Drafting: Elimination of the Privy Requirement as a Bar to Recovery by Foreseeable Third Parties*, 17 NEW ENG. L. REV. 955 (1982); Walker, *supra* note 14; Michael Greenwald, *The Law of the Lawyer Malpractice Action by Nonclient*, 27 PRAC. LAW. 4, 86 (1981); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision Making*, 54 VA. L. REV. 1166 (1968); D. Orville Lahy, *Perpetuities, Privy and Professional Liability*, 2 U. RICH. L. REV. 203 (1965); Walter Probert & Robert A. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708 (1980); John J. Meehan, *Careless Lawyers and Careworn Third Parties*, 28 BROOK. L. REV. 99 (1961); Note, *Negligence in Relation to Privy of Contract*, 30 YALE L.J. 607 (1921) (discussing privity issue generally rather than in regard to attorneys particularly); Jack I. Samet et al., *The Attack on the Citadel of Privy*, 20 BRIEF 9 (Winter 1991).

In addition, much has been written about this issue in other states as their courts faced turning points in their jurisprudence on this question. See, e.g., Jenkins, *supra* note 14; William W. Voorhees, Jr., *Attorney Malpractice: The Expanding Scope of Liability*, 18 SETON HALL L. REV. 630 (1988) (exploring the expansion, generally, of attorney malpractice in New Jersey); Matthew R. Bogart, Note, *Legal Malpractice for the Negligent Drafting of a Testamentary Instrument: Schreiner v. Scoville*, 73 IOWA L. REV. 1231 (1988); Centifanti, *supra* note 18 (examining non-client recovery in Ohio); Scott Peterson, Note, *Extending Legal Malpractice to Nonclients—The Washington Supreme Court Considers the Privy Requirement—Bowman v. John Doe Two*, 104 Wn.2d 181, 704 P.2d 140 (1985), 61 WASH. L. REV. 761 (1986) (examining third party suits in Washington); Note, *Attorney Malpractice—Third Party Beneficiaries—Named Beneficiaries Under a Will May Bring a Cause of Action in Assumpsit Against the Drafting Attorney*, 88 DICK. L. REV. 535 (1983) (examining third party issue in Pennsylvania); Brian J. Davis, *Lawyers' Negligence Liability to Non-Clients—A Texas Viewpoint*, 14 ST. MARY'S L.J. 405 (1983); Gerald P. Johnston, *Attorney Accountability in Kentucky—Liability to Clients and Third Parties*, 70 KY. L.J. 747 (1981); Joseph T. Kleespies, Com-

tory of the privity requirement nationally to place the New York question in context. It will then trace the scope of attorney liability in New York and examine the current state of that law—with its contradictions and inconsistencies. This Article will propose a new rule for New York courts to consider that centers on the “adversariness” of the *client* and the third party as the touchstone for determining if expanded liability is appropriate. This differs from the traditional analysis which bases the extent of non-client liability, if any, on the relationship between the *attorney’s* intentions and the third party. In proposing this rule, the paper will review the approaches taken in other jurisdictions to determine what, if anything, should be borrowed from those rules in creating New York’s standard. The proposed solution weighs the dangers of expanding liability against the dangers of refusing to expand liability and tries to balance those considerations in a way that fairly balances the interests of the legal profession, the clients, the public, and the injured third parties.<sup>19</sup>

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ment, *Liability of Lawyers to Third Parties for Professional Negligence in Oregon*, 60 OR. L. REV. 375 (1981); Gerald W. Boston, *Liability of Attorneys to Nonclients in Michigan: A Re-examination of Friedman v. Dozor and a Rule of Limited Liability*, 68 U. DET. L. REV. 307 (1991); John G. Mazurek, Note, *Liability of an Attorney to Third Party Beneficiaries for Legal Malpractice in Kansas: The Death of Privity*, 30 WASHBURN L.J. 501 (1991); E. Robert Wallach & Daniel J. Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA L. REV. 257 (1970). See also DUKE STERN & JO ANN FELIX, A PRACTICAL GUIDE TO PREVENTING LEGAL MALPRACTICE 117-63 (Supp. 1991) for an excellent bibliography of materials concerning legal malpractice that address this third party liability issue. For an interesting discussion of a separate but related issue, see Bell, *supra* note 6, at 1540 (arguing that rules regarding assignment of legal malpractice claims should be liberalized as the privity rule has been).

For a discussion of the legal malpractice issue in New York generally, without attention to the third party complexities, see Albert P. Beustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOK. L. REV. 233 (1953).

19. This Article is concerned with expansion of attorney liability to third parties under common law malpractice. Those responsibilities imposed on attorneys by statutes such as state or federal securities laws or banking laws are beyond the scope of this paper. For excellent discussions of these issues, see, e.g., Hyland, *supra* note 11, at 140-47; Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1336-41 (1991); Gardner, *supra* note 18, at 433-445; Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395 (1993); Michael W. Martin, Note, *Fairness Opinions and Negligent Misrepresentation: Defining Investment Bankers’ Duty to Third-Party Shareholders*, 60 FORDHAM L. REV. 133 (1991); *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979).

It should be noted at the outset that there are two paradigms in which attorney liability to non-clients arise. While such liability issues may arise in many circumstances, the two most common scenarios are those in which an attorney negligently drafts a will that fails, and those in which the attorney renders an allegedly negligent opinion that is detrimentally relied on by those other than the actual client. New York's jurisprudence, like that of most other jurisdictions, has developed through consideration of both types of cases. While factual differences between these two scenarios may make them appear to require different consideration, in fact, both involve the same issue: the extent to which any one other than the client has any legal right to rely on the attorney's work, and recover damages when that reliance results in a loss. Hence, throughout, this Article will assume that a well crafted liability rule will be able to fit both circumstances.

### I. Historical Development of the Privity Debate in Attorney Liability

For centuries, the responsibility of an attorney has consistently been viewed as one that runs primarily and directly to the client only.<sup>20</sup> Because of the interest in ensuring that an attorney gives undivided loyalty to a client's interests, courts have limited the degree to which an attorney might owe a responsibility to anyone else.

#### A. *National Savings Bank v. Ward: Adoption of the Strict Privity Rule by the Supreme Court*

In the United States, this traditional doctrine was firmly established by the Supreme Court in 1879 when it decided *National Savings Bank v. Ward*.<sup>21</sup> In that case, a typical third party liability problem, the defendant attorney was retained by

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20. See *People v. Fentress*, 103 Misc. 2d 179, 188, 425 N.Y.S.2d 485, 491 (Dutchess County Ct. 1980) ("The basis for the preservation of attorney-client confidentiality dates back to at least the Roman era. . . . It evolved from a concept assuring the sanctity of the attorney's honor, into a highly functional concern for the encouragement of unrestrained communication by laymen so that they might, without fear of betrayal, conduct their affairs through the hands of skilled practitioners.") (citations omitted).

21. 100 U.S. 195 (1879). See also Lawrence H. Averill, Jr., *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 384-87



his client to examine the title to a parcel of land.<sup>22</sup> The attorney certified to his client that the "title to the lot is good and that the property is [unencumbered] . . ."<sup>23</sup> Unfortunately, that was not an accurate assessment of the title since the land was encumbered.<sup>24</sup> The defendant's client presented the inaccurate certificate to a third party who loaned him money, using the land for security based on the belief that the title was good.<sup>25</sup> However, the loan was not repaid, and the lender lost his funds since the client had no assets other than the encumbered land.<sup>26</sup> The lender brought an action against the attorney, claiming that he had been injured by his reliance on the attorney's negligently prepared certification.<sup>27</sup> The lender did not argue that he retained the defendant attorney or that the attorney knew that the title would be relied on by the lender.<sup>28</sup> However, he argued that this mere lack of privity should not be a bar to recovery.<sup>29</sup>

The Supreme Court ruled that in the absence of privity no duty was owed by the attorney to the injured non-client.<sup>30</sup> In reaching its conclusion, the Court relied quite heavily on English precedents that painted a gloomy picture of an inevitable explosion of liability that could result from taking even the slightest step away from a strict privity requirement.<sup>31</sup> The

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(1967) (discussing *Ward* analysis); Theberge, *supra* note 18, at 960-63 (analyzing *Ward*).

22. *Ward*, 100 U.S. at 196.

23. *Id.* at 197.

24. *Id.* at 198.

25. *Id.* at 197.

26. *Id.* at 198.

27. *Id.* at 196.

28. *Id.* at 199.

29. *Id.* The lender argued:

[P]laintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

*Id.*

30. *Id.* at 205-06.

31. *Id.* at 202-03. The Court relied heavily on *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842). There, the court refused to hold a mail coach manufacturer liable for a construction defect resulting in injury to a driver with whom the manufacturer had no privity. *Id.* The court reasoned,

[I]f we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to

Supreme Court acknowledged that a different rule would apply if fraud or collusion were involved in the attorney's wrongdoing.<sup>32</sup> However, because neither was involved in *Ward*, the defendant attorney was not liable to the injured third party.<sup>33</sup>

Interestingly, in *Ward*, the Court makes little of the fact that the defendant was an attorney. The Court's rationale did not hinge on any concern that expanding liability would undermine the attorney-client relationship; nor did it suggest that the defendant's status made the privity requirement any more compelling than it would be if he were, for example, a manufacturer of a defective product, a non-attorney title examiner, or an accountant. Rather, the court based its concern on the practical difficulties that might result if the privity doctrine were abolished with respect to anyone—attorney or otherwise.<sup>34</sup>

Thus, following *Ward*, two steps were required before privity would cease to protect negligent attorneys from suit by injured third parties. First, the privity doctrine itself had to be abandoned as a general principle of immunity.<sup>35</sup> Second, the courts had to find that no good reasons existed to allow attorney defendants to remain shrouded in the secure cloak of privity after that cloak was removed from others.

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recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.

*Id.*; see also *Robertson v. Fleming*, 4 Macq. 167 (H.L.Sc. 1861). For a fuller discussion of the English antecedents to the American privity rule, see MALLIN & SMITH, *supra* note 10, at 364-65; Cooper & Kidder, *supra* note 18, at 6-16.

32. *Ward*, 100 U.S. at 203 ("Cases where fraud and collusion are alleged and proved constitute exceptions to that rule."). The Court noted that "where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty." *Id.* at 206.

33. *Id.* at 205-06.

34. *Id.* at 202-03. See also Lorton, *supra* note 9, at 1099 ("The emphasis on privity was not on concepts of equity, but rather upon a desire to prevent countless lawsuits and to establish a bright-line rule.").

35. Some commentators have theorized that the privity doctrine may have been retained intact for as long as it did for economic reasons as well as legal reasons. They theorize that privity aided in the growth of the industrial power of the United States by shielding newly developing manufacturers from vast economic liability for potential design defects. See Cooper & Kidder, *supra* note 18, at 51 ("In the context of the industrial revolution in which it was born, stringent privity of contract operated effectively to foster industrial development by reducing potential claims against infant industry.").

The first of these two steps was taken by the courts of New York relatively soon after *Ward*, most notably in the New York Court of Appeals decision in *MacPherson v. Buick*.<sup>36</sup> However, it is the second step that has been taken in other states but not, until recently, in New York. The California courts took the lead in destroying this second barrier in a pair of decisions that found that attorneys should not be immune from the growing tide away from strict privity.

B. *Biakanja v. Irving & Lucas v. Hamm: Abandoning the Strict Privity Rule by the California Courts*

1. *Biakanja v. Irving*

The initial blow to the privity rule was struck by the California Supreme Court in 1958 when it decided *Biakanja v. Irving*.<sup>37</sup> The facts of the case are those of the classic "disappointed beneficiary" variety. The plaintiff had been devised all her brother's estate in a will drawn up for her brother by the defendant.<sup>38</sup> However, the will was denied probate because the witnesses, under the defendant's supervision, failed to sign the will in the presence of each other as was required.<sup>39</sup> Hence, plaintiff's brother's estate passed through intestacy and plaintiff received only one-eighth of the estate rather than the entire estate as her brother had intended.<sup>40</sup>

The court did not dispute the contention that the defendant had been negligent in having the will attested improperly.<sup>41</sup> Rather, the issue was whether the plaintiff—who was never in privity of contract with the defendant—could claim that the defendant had any duty to protect her from the injury she suffered.<sup>42</sup> Interestingly, in *Biakanja*, the defendant was not actually an attorney but a notary.<sup>43</sup> Hence, the decision, techni-

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36. 217 N.Y. 382, 111 N.E. 1050 (1916). For discussions of the *MacPherson* case, see, e.g., Centifanti, *supra* note 18, at 371. For a discussion of *MacPherson*, see *infra* text accompanying notes 70-81.

37. 320 P.2d 16 (Cal. 1958).

38. *Id.* at 17.

39. *Id.*

40. *Id.*

41. *Id.* at 17-18.

42. *Id.* at 18.

43. *Id.* at 17. The court noted this fact with displeasure, remarking that "[h]is conduct was not only negligent, but was also highly improper. He engaged in the

cally, did not destroy the privity protection that attorneys enjoyed. However, the court's analysis regarding third party liability was easily transferrable to attorneys. Furthermore, and, perhaps more importantly, the *Biakanja* court disapproved the earlier California case,<sup>44</sup> *Buckley v. Gray*,<sup>45</sup> that had specifically held that attorneys had no duty to those with whom they did not have privity.<sup>46</sup>

The *Biakanja* court acknowledged the strength of the traditional rule that, with very few exceptions, "there was no liability for negligence committed in the performance of a contract in the absence of privity."<sup>47</sup> However, the court went on to trace the liberalization of that rule in the early half of this century as liability to third parties was expanded.<sup>48</sup> Interestingly, the court points to several New York cases as evidence of this expansion.<sup>49</sup> Thus, the court broke with its earlier precedents and determined that in cases such as *Biakanja* liability to a third party was justified.<sup>50</sup>

In establishing that liability could exist in this context, the court set forth six factors to be weighed in determining whether such liability exists in a particular case.<sup>51</sup> These factors are:

[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.<sup>52</sup>

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unauthorized practice of law . . . which is a misdemeanor." *Id.* at 19 (citations omitted).

44. *Id.* at 18.

45. 42 P. 900 (Cal. 1895).

46. *Id.* at 901. The court also disapproved its earlier holding in *Mickel v. Murphy*, 305 P.2d 993, 995 (Cal. Dist. Ct. App. 1957), which held that negligent notaries could not be liable to disappointed beneficiaries of invalid wills they drafted. *Biakanja*, 320 P.2d at 18.

47. *Biakanja*, 320 P.2d at 18.

48. *Id.*

49. *Id.* Specifically, the court points to *MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

50. *Biakanja*, 320 P.2d at 19.

51. *Id.*

52. *Id.*

Finding that the circumstances of the notary's conduct fit these criteria, the court, en banc, found liability.<sup>53</sup>

## 2. Lucas v. Hamm

Only three years later, the California Supreme Court was faced with a case in which negligence was committed by a defendant who was licensed to practice law. In that case, *Lucas v. Hamm*,<sup>54</sup> liability to those not in privity was applied to attorneys. The facts of *Lucas* were strikingly similar to those in *Biakanja*. In *Lucas*, the defendant attorney had contracted to write a will for the decedent, leaving portions of the residual estate to the plaintiffs.<sup>55</sup> However, the defendant prepared the will in a way that made the intended bequest invalid under the rule against perpetuities.<sup>56</sup> The plaintiffs had to settle with the decedent's relatives for an amount \$75,000 less than they would have received had the will been drafted in a way that would have accomplished the decedent's directions.<sup>57</sup> Thus, the plaintiffs sued the drafting attorney for the value of what they would have received, alleging that their failure to receive their share of the estate was the "direct and proximate result of the negligence of the defendant and his breach of contract in preparing the testamentary instruments and the written advice . . . ."<sup>58</sup>

The court reviewed the third party liability "balancing test" of *Biakanja*, and determined that it should be expanded to attorneys.<sup>59</sup> The court found that the key policy reasons behind the expansion of such liability applied to attorneys with the same force as they applied to the *Biakanja* defendant,<sup>60</sup> and the only additional question to be considered before a wholesale adoption of *Biakanja* was "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."<sup>61</sup> The court first rejected the traditional fear of unlimited liability as a reason for

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53. *Id.*

54. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

55. *Id.* at 686.

56. *Id.*

57. *Id.* at 687.

58. *Id.*

59. *Id.* at 687-88.

60. *Id.* at 688.

61. *Id.*

limiting third-party recovery.<sup>62</sup> It did so on the rather disingenuous grounds that the liability may be "large and unpredictable" vis-a-vis the actual client, and this has not blocked liability to clients in privity.<sup>63</sup> The court was also moved by the more obvious point that without such a decision, the innocent injured party would have to bear the loss.<sup>64</sup>

The court also followed the traditional third-party beneficiary logic, reasoning that liability should be extended because it was clear that the intent of the testator in contracting with the attorney was to ensure that the estate pass to the plaintiffs.<sup>65</sup> The plaintiffs in the case were thus the direct intended third party beneficiaries of the contract for the attorney's services.<sup>66</sup> The court also went a step further and stated that for such liability to arise, there need be no manifestation that the attorney intended to benefit the third party.<sup>67</sup> Thus, the *Lucas* decision established that, in California at least, "intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third party beneficiaries."<sup>68</sup>

*Lucas* and *Biakanja* were, quite understandably, greeted with a great deal of interest and alarm from legal commentators, since they made it quite clear that the wall of privity was no longer an impenetrable barrier to attorney liability.<sup>69</sup> While

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62. *Id.*

63. *Id.* However, what the court did not consider in making this argument is that the "large and unpredictable" liability that an attorney does, in fact, have to actual clients will be multiplied in situations where non-clients recover, making such liability larger and more unpredictable.

64. *Id.*

65. *Id.* at 689.

66. *Id.* The court declined to find that the plaintiffs were only the incidental or remote beneficiaries of the contract. *Id.*

67. *Id.* In doing so, the court disapproved earlier cases which indicated that there had to be "'an intent clearly manifested by the promisor'" to benefit the third party before there could be such liability. *Id.* (quoting *Smith v. Anglo-California Trust Co.*, 271 P. 898, 901 (Cal. 1928); *Fruitvale Canning Co. v. Cotton*, 252 P.2d 953, 955 (Cal. Ct. App. 1953)).

68. *Id.* Ironically, in this case, the court did not find that the attorney had been negligent since the aspect of the rule against perpetuities that was involved was so complex that the attorney's failure to handle it correctly did not constitute negligence. *Id.* at 690.

69. For early comments on these landmark cases, see, e.g., Case Note, 30 FORDHAM L. REV. 369, 369-70, 371 (1961); Note, *Attorney Malpractice*, 63 COLUM.

these cases both originated in California, they were soon being considered in other jurisdictions, as other courts confronted the issue of such liability—both generally, and with respect to attorneys.

## II. New York Attorney Liability

### A. *Guidance from the Court of Appeals*

#### 1. *MacPherson v. Buick: Creating Third Party Liability in Tort*

Often cited as persuasive authority for other states to abandon their strict privity rules, *MacPherson v. Buick*<sup>70</sup> was a products liability case in which Judge Cardozo, writing for the New York Court of Appeals, addressed the question of whether an allegedly negligent automobile manufacturer “owed a duty of care and vigilance to any one but the immediate purchaser.”<sup>71</sup>

In *MacPherson* the plaintiff was injured by a defect in an automobile.<sup>72</sup> Although the plaintiff did not purchase the vehicle directly from the manufacturer and, therefore, lacked privity, the plaintiff sued the manufacturer directly.<sup>73</sup> The plaintiff argued that the lack of privity should not bar recovery.<sup>74</sup> The court agreed with the plaintiff, and found that contractual privity need not exist before one could be liable to another for the manufacture of a defective product.<sup>75</sup> Rather, in determining whether there should be such liability, the court turned to such

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L. REV. 1292 (1963); Estil A. Vance, Note, 40 TEXAS L. REV. 1046, 1049 (1962) (“Hopefully this decision marks the beginning of the gradual elimination of privity as a bar to a negligence action against an attorney . . . .”); Lahy, *supra* note 18; Recent Decision, 22 MD. L. REV. 161 (1962); Thomas E. Schatzel, Note, *Attorney and Client Negligence: Liability to Third Parties*, 34 ROCKY MT. L. REV. 388 (1962); Recent Case, 75 HARV. L. REV. 620 (1962); Meehan, *supra* note 18, at 99 (“[T]he citadel of privity is collapsing and . . . some of it is tumbling about the ears of the lawyers.”); Richard Mulholland, Cases Noted, 14 U. MIAMI L. REV. 124, 126 (1959). For more recent comment, see Lorton, *supra* note 9, at 1102-03; Centifanti, *supra* note 18, at 373; Averill, *supra* note 21, at 396-403; John W. Wade, *The Attorney’s Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

70. 217 N.Y. 382, 111 N.E. 1050 (1916).

71. *Id.* at 385, 111 N.E. at 1051.

72. *Id.* at 384-85, 111 N.E. at 1051.

73. *Id.*

74. *Id.* at 389-91, 111 N.E. at 1053.

75. *Id.* at 389, 111 N.E. at 1053.

considerations as whether the object in question is dangerous,<sup>76</sup> whether the danger is "not merely possible, but probable,"<sup>77</sup> whether the danger can be foreseen,<sup>78</sup> and whether it is apparent to the manufacturer that the product will be used by people in addition to those with whom there is privity.<sup>79</sup>

The court acknowledged the strong hold of the traditional privity requirement, and discussed at length the English and American precedents that supported it.<sup>80</sup> However, the court justified its departure from those precedents, citing the changing needs of the twentieth century rather than the old fears of unlimited, spiraling liability.<sup>81</sup>

Thus, following *MacPherson*, in the products liability context at least, those lacking privity can state a claim against a manufacturer if they are the reasonably foreseeable victims of a reasonably foreseeable harm. Were this ruling to be analogized to the attorney liability question, a court should find liability where attorneys are aware of the potential harms they may cause; they know that there is a high probability of that danger occurring; and they know that those other than their clients will be affected by their work. However, to date, New York courts have not made this analogy or created attorney liability on *MacPherson* grounds.

## 2. *Lawrence v. Fox & Seaver v. Ransom: Creating Third Party Liability in Contract*

Just as the *MacPherson* decision could have justified expanded attorney liability to third parties in tort, the court's classic 1859 case, *Lawrence v. Fox*,<sup>82</sup> might have laid the

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 391, 111 N.E. at 1053.

80. *Id.* at 392, 111 N.E. at 1054.

81. *Id.* at 386, 111 N.E. at 1052. The court's frank admission that it was abruptly changing the rule may be nearly as remarkable a feature of this case as the legal determination itself. As the court acknowledged:

Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

*Id.* at 391, 111 N.E. at 1053.

82. 20 N.Y. 268 (1859).



groundwork for third party claims against an attorney in contract. *Lawrence* was a traditional third party beneficiary contract case. In that case, the defendant borrowed money from "Holly" and agreed to repay it the next day.<sup>83</sup> Because Holly owed the same sum to the plaintiff, he requested that the defendant repay the money not to him but to the plaintiff.<sup>84</sup> Hence, although the plaintiff was a complete stranger to the actual contract, the defendant had promised Holly that he would perform the benefit to the plaintiff of repaying him the funds that Holly owed him. When the funds were not repaid, the plaintiff brought this action against the defendant for failing to perform on the contract made for his benefit.<sup>85</sup>

The court ruled for the plaintiff, and found that the plaintiff's lack of privity could not justify denying the plaintiff a right of action. The court adopted the traditional rule that "a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach . . . ."<sup>86</sup> Thus, analogizing from this rule, if the primary aim of A's retention of an attorney is to benefit B, then B should be able to bring an action against the attorney if that benefit was not received. However, such an analogy did not follow.

Nearly sixty years later, *Seaver v. Ransom*<sup>87</sup> might have strengthened the foundations for such a third party contract claim.<sup>88</sup> In *Seaver*, a husband wrote a will for his dying wife.<sup>89</sup> The wife objected to the will because it did not include a provision leaving her house to a favorite niece.<sup>90</sup> However, she feared that she would not have time to wait for the will to be revised, so her husband made a solemn promise to her that he would include a provision in his own will leaving the niece six

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83. *Id.* at 274.

84. *Id.*

85. *See id.* at 269.

86. *Id.* at 274. The court rejected the defendant's view that this rule should be limited to trust cases. *Id.*

87. 224 N.Y. 233, 120 N.E. 639 (1918).

88. An excellent analysis of *Seaver* appears in Melvin A. Eisenberg, *Third Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1371-73, 1389-91 (1992).

89. *Seaver*, 224 N.Y. at 235, 120 N.E. at 639.

90. *Id.*

thousand dollars, the value of the home.<sup>91</sup> However, when the husband died, his will also made no provision for the niece.<sup>92</sup>

The niece brought suit to enforce the contract that had been made for her benefit,<sup>93</sup> and the Court of Appeals affirmed the lower court decision that allowed her to recover, even though she was not a party to the contract and gave no consideration for the benefit she was to derive.<sup>94</sup> The court acknowledged that "the right of the beneficiary to sue on contract made for his benefit is not [clear] or [simple] . . ."<sup>95</sup> and also recognized that American courts were still divided on this issue. However, it found the rule allowing recovery to be the better one.<sup>96</sup> The *Seaver* decision may have been used to expand attorney liability to third parties, at least in the "will beneficiary" cases, since in those cases it could be argued that the testator contracts with the attorney to provide a benefit (a valid transfer of testamentary property) to a third party. However, New York's courts declined to follow this rationale.

### 3. *Ambiguity in the Court of Appeals*

After these early cases, the Court of Appeals considered the third party liability issue again, in cases involving both attorneys' and non-attorneys' alleged wrongs against third parties. Unfortunately—for the interest of clarity—the highest court of the state has not spoken to this issue unequivocally or consistently. Thus, the guidance from the state's highest court on the precise issue of attorney liability is rather meager.

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91. *Id.* at 236, 120 N.E. at 639-40.

92. *Id.* at 236, 120 N.E. at 640.

93. *Id.* at 236, 120 N.E. at 639.

94. *Id.* at 241-42, 120 N.E. at 642.

95. *Id.* at 237, 120 N.E. at 640.

96. The reasons for allowing third party recovery, as laid out by the court, were that "[I]t is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay." *Id.* The court also acknowledged that previous decisions had already allowed third party recovery in instances where "there is a pecuniary obligation running from the promisee to the beneficiary," where the contract was made to benefit a wife or children; or where the contract was a "public contract." *Id.* at 238, 120 N.E. at 640. Therefore, the court found that this case would not be such a radical departure from a framework that had already existed, albeit in more limited circumstances.

In *Glanzer v. Shepard*,<sup>97</sup> the court appeared to reaffirm the direction it had begun to take in *MacPherson* by holding a public weigher liable to the purchaser of beans even though the seller, not the buyer, had been the one who contracted for the weigher's services.<sup>98</sup> The defendant weighed the beans, and certified the weight incorrectly, overstating it.<sup>99</sup> Thus, the plaintiff paid \$1,261.26 more for the beans than they were worth.<sup>100</sup> The suit attempted to recover that amount from the public weigher, even though the buyer had not retained the weigher's services.<sup>101</sup>

The Court of Appeals allowed the plaintiff to recover against the defendant, adopting a rather open-ended yet logical "end and aim" test for recovery.<sup>102</sup> Via this test, the court determined that if the "end and aim" of a professional's work is "either wholly or in part for the benefit of another,"<sup>103</sup> liability may ensue. Two factors influenced the court's analysis. First, the court made much of the fact that the weigher's action actually *induced the plaintiff to act*, and weighed this heavily in the analysis.<sup>104</sup> The court also acknowledged that the scope of liability should be adjusted depending on how much the defendant knew his work would be relied on by those other than the actual client.<sup>105</sup> Thus, when applied to a third party claim against an attorney, the notion that the attorney's negligent action influenced a third party would be difficult if not impossible to prove in the absence of reliance. However, once that hurdle is overcome, the second factor—that the attorney was aware of the use his advice would be put to—seems easier to establish in most cases. Hence, after *Glanzer*, the Court of Appeals had inched even closer to attorney liability than it had in the landmark

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97. 233 N.Y. 236, 135 N.E. 275 (1922). See also Averill, *supra* note 21, at 387-88 (discussing *Glanzer* analysis).

98. *Id.* at 238, 135 N.E. at 275.

99. *Id.*

100. *Id.*

101. *Id.* On the trial level, the verdict was for the plaintiff; the Appellate Term reversed on lack of privity grounds; the Appellate Division then reversed the Appellate Term, agreeing with the trial court and reinstating its verdict. *Id.*

102. *Id.* at 242, 135 N.E. at 277.

103. *Id.*

104. *Id.* at 239, 135 N.E. at 276.

105. *Id.* at 240, 135 N.E. at 276 ("Constantly, the bounds of duty are enlarged by knowledge of a prospective use.").

*MacPherson* case. However, *Glanzer* did not expand attorney liability to non-clients.<sup>106</sup>

Following less than ten years after *Glanzer*, the Court of Appeals' decision in *Ultramares v. Touche*<sup>107</sup> seemed to contradict the *Glanzer* rationale and move the court again away from holding attorneys liable to third parties.<sup>108</sup> The accountant-defendants in *Ultramares* had prepared and certified balance sheets for Fred Stern & Co.<sup>109</sup> These balance sheets were then circulated to potential lenders, who would make their decisions whether or not to lend Stern money based upon the representations in the balance sheets.<sup>110</sup> However, the balance sheets were inaccurate and the plaintiffs—who lent Stern money based on those representations—brought this action against the accountants for fraudulent and negligent misrepresentation to recover the amount they had lost through the transactions.<sup>111</sup> The court found that there had been negligence, and ordered a new trial on the issue of fraud.<sup>112</sup> However, the debate on the

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106. The *Glanzer* court also cites *National Savings Bank v. Ward*, 100 U.S. 195 (1879), apparently with approval. *Glanzer*, 233 N.Y. at 240, 135 N.E. at 276. Unfortunately, the court does not elaborate on why this case is decided differently. Hence, it is not clear whether the fact that *Glanzer* did not involve an attorney was dispositive, or whether there were other significant reasons justifying the opposite outcomes. For continued discussion of *Glanzer*, see Cooper & Kidder, *supra* note 18, at 17-19.

107. *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). For further discussion of *Ultramares*, see Richard L. Miller, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW. 588, 590-95 (1972); Theberge, *supra* note 18, at 963-66.

108. Between *Glanzer* and *Ultramares*, the court decided the landmark *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (holding relation of defendant's agent's conduct to injury of plaintiff too remote to warrant liability in tort). The facts and issues of *Palsgraf* are too different from those involved in attorney malpractice suits to warrant lengthy discussion of that case. However, as the *Palsgraf* court discusses causation and the required proximity of defendant's negligence to plaintiff's injury, it makes some strong statements, albeit in a different context, that a wrong done to another cannot be the sole grounds for recovery. To recover, the successful plaintiff must complain "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." *Id.* at 342, 162 N.E. at 100. Although this philosophy would not bar recovery by third parties against negligent attorneys, it is also quite clear that to have any chance of success there must be an actual injury to the third party plaintiff, separate and apart from the wrong committed against the actual client.

109. *Ultramares*, 255 N.Y. at 170, 174 N.E. at 442.

110. *Id.*

111. *Id.* at 173-79, 174 N.E. at 442-44.

112. *Id.* at 193, 174 N.E. at 450.

liability to the third party lenders was the more significant and controversial issue for the court to decide.

Judge Cardozo acknowledged that the national trend was toward expanding liability, and that "the assault upon the citadel of privity is proceeding in these days apace."<sup>113</sup> He also observed that the courts of New York appeared to be joining the "assault."<sup>114</sup> However, he refused to expand the scope of duty in *Ultramares*.<sup>115</sup> In many ways, *Ultramares* seemed to be a good candidate for expansion of liability since the accountants provided thirty-two copies of their certified report, and "knew that in the usual course of business the balance sheet when certified would be exhibited by the Stern Company to banks, creditors, stockholders, purchasers, or sellers . . ."<sup>116</sup> This would seem to justify expanded liability on the same theory that the *Glanzer* weigher was liable: because the defendant knew that a buyer would rely directly on his representation.

Nevertheless, Cardozo found that the court's previous decisions did not require a ruling for the plaintiff in this case, and he declined to use *Ultramares* as a vehicle for expanding that liability.<sup>117</sup> Thus, after *Ultramares*, "the ensuing liability for negligence is one that is bounded by the contract and is to be enforced between the parties by whom the contract has been made"<sup>118</sup>—seemingly a contradiction of *Glanzer*.<sup>119</sup>

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113. *Id.* at 180, 174 N.E. at 445.

114. Judge Cardozo discusses, in some detail, the court's decisions in *Glanzer*; *Doyle v. Chatham & Phoenix Nat. Bank*, 253 N.Y. 369, 171 N.E. 574 (1930); *International Prods. Co. v. Erie R.R.*, 244 N.Y. 331, 155 N.E. 662, *cert. denied*, 275 U.S. 527 (1927).

115. *Id.* at 85, 174 N.E. at 447.

116. *Ultramares*, 255 N.Y. at 173, 174 N.E. at 442. It is also true, however, that the accountants did not know that this particular plaintiff would ever see the report. *Id.* at 174, 174 N.E. at 442.

117. *Id.* at 185, 174 N.E. at 447.

118. *Id.* at 189, 174 N.E. at 448.

119. *Ultramares* was followed seven years later by *State St. Trust Co. v. Ernst*, 278 N.Y. 104, 15 N.E.2d 416 (1938). In an interesting decision, while the court claims to, and in fact does, respect the rule in *Ultramares*, it also granted plaintiffs a new trial after a verdict in their favor had been set aside by the trial court. *State St.*, 278 N.Y. at 123, 15 N.E.2d at 418. It did so by ruling that there was sufficient evidence to find that the defendants had acted in such a way to bring them within the "fraud" or "gross negligence" exception to the privity protection. The court adopts an expansive view of the types of conduct that would fall into this exception:

However, while *Ultramares* in fact retreated from the possibility of attorney third party liability, in dicta it suggests otherwise. Cardozo commented that if liability were to be found for the *Ultramares* accountants, this liability

will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinions will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy was between client and adviser.<sup>120</sup>

Significantly, Cardozo does not suggest that the attorney-client relationship might justify treating attorneys differently from bean-weighers or accountants. Logically, then, if the court were to have decided against the accountants in *Ultramares*, it would follow that Cardozo's logic would impose liability against attorneys on the same terms. Of course, by failing to find the accountants liable, the court avoided the attorney liability question. Yet, dicta at least suggests that perhaps the arguments traditionally made to protect attorneys more zealously than other professionals may not be as persuasive as they were at one time.<sup>121</sup>

Accountants were finally found liable to non-clients in *White v. Guarente*,<sup>122</sup> nearly fifty years after *Ultramares*. In

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A representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet. In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention.

*Id.* at 111-12, 15 N.E.2d at 419. Thus, although *State St.* does not provide a full analysis of the third party liability question, it does raise an interesting collateral question: To what extent will a broad reading of the "fraud," "collusion," or "gross negligence" exceptions serve to modify the strict privity rule, and to what extent can a court use them as "loopholes" to avoid the often harsh results of the rule? Neither of these things was done by the court in *State St.*, but the possibility exists.

120. *Ultramares*, 255 N.Y. at 188, 174 N.E. at 448.

121. *But see* Lewis, *supra* note 18, at 807 (theorizing that in *Ultramares* "the court denied liability out of fear that it would later be extended to attorneys").

122. 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977).

*White*, an accountant was retained by a partnership to perform auditing services and prepare tax returns.<sup>123</sup> However, one of the partners sued the accountant, claiming that the audit reports were misleading and inaccurate.<sup>124</sup> The accountant relied on *Ultramares* for the proposition that there should be no liability because the partnership, not the individual partners, was the client.<sup>125</sup> However, the court found this case to be more like *Glanzer* than *Ultramares* and allowed recovery.<sup>126</sup>

Specifically, the court was persuaded by the fact that in this case the accountant knew the exact identity of the partners and thus was not in danger of having liability "extended to a faceless or unresolved class of persons."<sup>127</sup> Rather, the identity of the plaintiffs was known to the defendant accountant just as the identity of the buyer in *Glanzer* was known to the defendant weigher.<sup>128</sup> Thus, after *White*, while the court had yet to deal directly with the question of the attorney malpractice problem, it seemed clear that, at least against accountants, mere lack of privity would not bar recovery in all cases.<sup>129</sup> Rather, the determination was made after reviewing whether the injured third party belonged to a class whose identity would be easily known to the negligent professional. Combined with Justice Cardozo's statements in *Ultramares* indicating that attorney liability would follow closely after accountant liability, it would seem logical to assume that after *White*, attorney liability to a defined set of injured third party plaintiffs would not be difficult to find.<sup>130</sup>

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123. *Id.* at 359, 372 N.E.2d at 317, 401 N.Y.S.2d at 476.

124. *Id.* at 360, 372 N.E.2d at 318, 401 N.Y.S.2d at 477. More specifically, the accountants were accused of hiding the fact that several of the partners were making withdrawals from their capital accounts in violation of the partnership agreement. *Id.* at 360, 372 N.E.2d at 318, 401 N.Y.S.2d at 476.

125. *Id.* at 360-61, 372 N.E.2d at 318, 401 N.Y.S.2d at 477.

126. *Id.* at 362, 372 N.E.2d at 319, 401 N.Y.S.2d at 478.

127. *Id.* at 361, 372 N.E.2d at 318, 401 N.Y.S.2d at 477.

128. *Id.* at 361-62, 372 N.E.2d at 319, 401 N.Y.S.2d at 478.

129. *But see* *Aeronca, Inc. v. Gorin*, 561 F. Supp. 370, 377-78 (S.D.N.Y. 1983) (applying New York law) (supporting narrow, restrictive reading of *White*).

130. However, in *Quintel Corp., N.V. v. Citibank, N.A.*, 589 F. Supp. 1235 (S.D.N.Y. 1984), the district court, applying New York law, interpreted the *White* holding very narrowly vis-a-vis the attorney defendants. The court declined to hold that the attorneys representing a partnership should foresee that individual partners would rely on them. *Id.* at 1243-44. Rather, the court followed the traditional rule that in New York "an attorney generally cannot be held liable to third

*Credit Alliance Corp. v. Arthur Anderson*<sup>131</sup> represented yet another attempt of the court to address this issue. Again, though, it involved accountants rather than lawyers and thus did not provide a definitive resolution of the issue. *Credit Alliance* involved two related cases which came up on appeal together.<sup>132</sup> Both cases concerned accountants who had certified the accuracy of their clients' financial statements and third party lenders who lent money to the clients based on the representations in the financials.<sup>133</sup> As is often the case, the financials were not accurate, the clients went bankrupt, the lenders lost significant amounts of money, and the accountants were sued for their failure to provide accurate information.<sup>134</sup> The first of these actions asserted claims of negligence and fraud; the second alleged negligence and gross negligence.<sup>135</sup>

Before determining the merits of the two cases before it, the Court of Appeals announced the rule it would apply to the case, a rule that is a synthesis of the Court's previous decisions in *Ultramares*, *White*, and *Glanzer*:

Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountant must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.<sup>136</sup>

Thus, this rule allows the plaintiffs in an accountant malpractice suit to establish a relationship similar to privity as a substitute for it to allow for recovery in such proceedings. This substitute relationship focuses primarily on the thoughts and

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parties for actions taken in furtherance of his role as counsel" absent a showing of fraud, tortious acts, or acts exceeding the scope of honorable employment. *Id.* at 1240-41.

131. 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985).

132. *Id.* at 541, 483 N.E.2d at 111, 493 N.Y.S.2d at 436.

133. *Id.* at 542, 483 N.E.2d at 112, 493 N.Y.S.2d at 437.

134. *Id.*

135. *Id.* For a discussion of the facts in these cases, see *id.* at 545, 483 N.E.2d at 114, 493 N.Y.S.2d at 439.

136. *Id.* at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443.



actions of the accountants—not the clients or the third parties—to determine if the accountant should be held to the privity rule.<sup>137</sup> Thus, if applied to attorneys, an extension of the *Credit Alliance* rule would allow recovery only in those circumstances where it was clear through their actions that the attorneys intended that the third party be entitled to rely on their work and there was some credible manifestation of acquiescence in that liability.

In the first *Credit Alliance* appeal, the court declined to allow the action to be maintained against the accountant because there was “no allegation that [the accountant] had any direct dealings with the plaintiffs, had specifically agreed . . . to prepare the report for plaintiffs’ use or according to plaintiffs’ requirements, or had specifically agreed . . . to provide plaintiffs with a copy or actually did so.”<sup>138</sup> Thus, the court found that the “sufficiently approaching privity” relationship it established was not present, and thus the claim should not proceed.<sup>139</sup> However, the court reached a different outcome in the second appeal, ruling that there was enough evidence to indicate that the accountant, through his actions, intended to establish a relationship with the plaintiff that was sufficient to justify allowing the plaintiff to proceed.<sup>140</sup> Specifically, the court was persuaded by the fact that

the parties [i.e. the non-client plaintiff and the defendant accountant] remained in direct communication, both orally and in writing, and, indeed, met together. . . . It cannot be gainsaid that the relationship thus created between the parties was the practical equivalent of privity. The parties’ direct communications and personal meetings resulted in a nexus between them sufficiently approaching privity under the principles of *Ultramares*, *Glanzer* and *White* to permit [plaintiff’s] causes of action.<sup>141</sup>

In 1992, several months before the final *Prudential* decision, the Court of Appeals faced the accountant liability issue anew under circumstances a bit different from *Credit Alliance*.

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137. *Id.*

138. *Id.* at 553, 483 N.E.2d at 119, 493 N.Y.S.2d at 444.

139. *Id.*

140. *Id.* at 554, 483 N.E.2d at 120, 493 N.Y.S.2d at 445.

141. *Id.* (emphasis added). For further description of the nature of the interactions between the plaintiff and the defendant, see *id.* at 544 n.4, 483 N.E.2d at 113 n.4, 493 N.Y.S.2d at 438 n.4.

In *Security Pacific v. Peat Marwick Main & Co.*,<sup>142</sup> the lender sought to hold an accounting firm liable for the alleged negligence of its predecessor firm. The claim was that the lender decided to make a loan to a client based on a review of the client's financial statements prepared by the predecessor accountants.<sup>143</sup> The lender argued that the accountants prepared those financial statements negligently and, therefore, funds were lent that should not have been lent, and the lender suffered financial losses.<sup>144</sup> The plaintiffs argued that the relationship between them and the accountants should be grounds for liability under the *Credit Alliance* standard, but the Court of Appeals took a narrow view of the types of relationships that "sufficiently approach[ed] privity" in a way that would justify third party liability.<sup>145</sup>

At issue was the accountants' 1984 audit of the client's financial statements—the financials on which the lender relied in making the loan. Allegedly, the lender never contacted the accounting firm as it did its investigation, nor did the lender inform the accountants that its decision to lend the funds would be "conditioned on [the] 1984 audit opinion."<sup>146</sup> The strongest basis for the plaintiff's claim that a close relationship arose came from the fact that a vice president of the lender called the accountant's audit partner to discuss the 1984 audit.<sup>147</sup> Although the plaintiff made no notes of the conversation and made no more contacts with the accountants, the plaintiff claimed that the recommendation to make the loan to the defendant was based on the tentative draft of the audit and "general assurances [the vice president] claimed [the audit partner] had given him during that phone call."<sup>148</sup>

In determining whether these circumstances would allow the plaintiff's claim, the court took a very narrow view of the *Credit Alliance* test. It found that a "single unsolicited phone

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142. 79 N.Y.2d 695, 597 N.E.2d 1080, 586 N.Y.S.2d 87 (1992).

143. *Id.* at 698, 597 N.E.2d at 1081, 586 N.Y.S.2d at 88.

144. *Id.* These losses were alleged to be at least eight million dollars. *Id.*

145. *Id.* at 703, 597 N.E.2d at 1083, 586 N.Y.S.2d at 90.

146. *Id.* at 700, 597 N.E.2d at 1082, 586 N.Y.S.2d at 89.

147. *Id.* The defendants claimed not to have any recollection of the phone call but "conceded for purposes of summary judgment that a phone call had occurred." *Id.*

148. *Id.* at 701, 597 N.E.2d at 1082-83, 586 N.Y.S.2d at 89-90.

call"<sup>149</sup> in which only generalities were discussed was not sufficient to create the necessary relationship to warrant liability. In part, the court recognized the danger of allowing such liability to arise through the unilateral actions of one party to the transaction.<sup>150</sup> The court was also influenced by the facts that the accountants neither specifically agreed to serve the lender's needs nor gave a copy of their report directly to the lender.<sup>151</sup> Rather, the evidence indicated that the primary purpose of the report was to assist the accountants' client in complying with federal reporting requirements.<sup>152</sup> Thus, in its interpretation of *Credit Alliance*, the court took a narrow view of the types of conduct that will "sufficiently approach privacy"<sup>153</sup> for purposes of finding third party liability for accountants.<sup>154</sup>

Thus, until the 1992 *Prudential* decision, *Credit Alliance* and its progeny represented the Court of Appeals' fullest discussion of third party liability in the professional context.<sup>155</sup> Yet, it did not deal with attorneys, nor did it state in dicta whether

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149. *Id.* at 705, 597 N.E.2d at 1085, 586 N.Y.S.2d at 92.

150. *Id.* at 706, 597 N.E.2d at 1085-86, 586 N.Y.S.2d at 92-93. Indeed, the court paints a dim picture of lenders seeking additional protection by merely calling others' auditors and announcing that they would be relying on the audit reports. *Id.*

151. *Id.* at 706, 597 N.E.2d at 1086, 586 N.Y.S.2d at 93.

152. *Id.* at 707, 597 N.E.2d at 1086, 586 N.Y.S.2d at 93.

153. The dissent in *Security Pacific* took a negative view of this narrow holding, saying that it "erects one of the most forbidding legal barriers in the country to accountants' liability." *Id.* at 709, 597 N.E.2d at 1087, 586 N.Y.S.2d at 94 (Hancock, J., dissenting). Indeed, the thrust of the lower court's opinion appears to be that, by its narrow reading of *Credit Alliance*, the court in fact undoes that decision.

154. See also *Iselin & Co. v. Landau*, 71 N.Y.2d 420, 427, 522 N.E.2d 21, 24, 527 N.Y.S.2d 176, 179 (1988) (rejecting lender's negligence claim against accountant where there was "nothing in relation to the contacts between [the lender and the accountant] which would establish a nexus between them sufficiently approaching privacy."); *Westpac Banking Corp. v. Deschamps*, 66 N.Y.2d 16, 17, 484 N.E.2d 1351, 1351, 494 N.Y.S.2d 848, 848 (1985) (adopting narrow view of accountant third party liability, denying recovery "where a link between the accountants and the lender is not shown . . .").

155. *Credit Alliance* was strongly endorsed in a recent Court of Appeals decision that applied the *Credit Alliance* standard to allow an action to be maintained by a third party against consulting engineers for negligent misrepresentation. See *Ossining Union Free Sch. Dist. v. Anderson*, 73 N.Y.2d 417, 422, 539 N.E.2d 91, 93, 541 N.Y.S.2d 335, 337 (1989). The court also based its decision on the *MacPherson* logic saying, "[i]n theory, there appeared to be no reason why the privacy bar should be dispensed with in cases such as *MacPherson* but retained in certain types of other negligence cases." *Id.*

this same rule should be applied to professions other than accounting.<sup>156</sup> Rather, until *Prudential*, the Court of Appeals' jurisprudence on the precise issue of attorney liability to third parties was limited to either the occasional affirmance of lower court decisions that followed the traditional privity requirement, or a reversal of lower court decisions that appeared to depart from the traditional rule.<sup>157</sup>

For example, only three years before *Credit Alliance* appeared to raise the possibility of third party liability for accountants, the court decided *Harder v. McGinn*,<sup>158</sup> affirming an appellate division order<sup>159</sup> reversing a supreme court decision denying an attorney's motion to dismiss an action filed against him by a third party.<sup>160</sup> In *Harder*, the defendant attorney was accused of negligently representing his client.<sup>161</sup> This action was brought by the client's ex-wife who claimed that she had a cause of action against the attorney because, as a creditor of her former husband, she was injured by his negligence.<sup>162</sup> In a short opinion, the court agreed with the appellate division that the attorney's motion to dismiss should be granted on the grounds that the attorney could not breach a duty to the plaintiff because he did not have any duty to her.<sup>163</sup> In its reasoning, the court relied on the traditional New York rule that there is no liability to a nonclient absent any evidence of fraud, collusion or malicious acts.<sup>164</sup>

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156. In the 1970s, prior to *Credit Alliance*, two articles criticized the way in which New York courts respected privity for accountants. See Albert G. Besser, *Privity? An Obsolete Approach to the Liability of Accountants to Third Parties*, 7 SETON HALL L. REV. 507 (1976); Judah Septimus, Note, *Accountants' Liability for Negligence—A Contemporary Approach for a Modern Profession*, 48 FORDHAM L. REV. 401 (1979).

157. See also *Drago v. Buonagurio*, 46 N.Y.2d 778, 779, 386 N.E.2d 821, 822, 413 N.Y.S.2d 910, 911 (1978) (refusing to find liability of attorney to physician whom he named as defendant in allegedly baseless malpractice proceeding on theory that there was no attorney liability to third parties).

158. 58 N.Y.2d 633, 444 N.E.2d 977, 458 N.Y.S.2d 513 (1982).

159. 89 A.D.2d 732, 454 N.Y.S.2d 42 (3d Dep't), *aff'd*, 58 N.Y.2d 663, 444 N.E.2d 1006, 458 N.Y.S.2d 542 (1982).

160. *Id.* at 733, 454 N.Y.S.2d at 43.

161. *Id.*

162. *Id.*

163. *Harder v. McGinn*, 58 N.Y.2d 663, 663, 444 N.E.2d 1006, 1006, 458 N.Y.S.2d 542, 542 (1982).

164. *Id.*

Thus, after *Harder*, there appeared to be less of a chance that the Court of Appeals would reverse the traditional rule. Perhaps as evidence of the lack of high court authority, the *Harder* court cites only to lower court decisions to justify its holding.<sup>165</sup>

### B. *Conflicting Advice from the Lower Courts*

Thus, examination of the leading Court of Appeals' cases on this issue demonstrates both a lack of a clear rule on attorney liability to third parties and an absence of attorney-specific cases, requiring much argument by analogy to cases involving other professionals. The jurisprudence from the lower courts on this issue is much more abundant and can generally be divided into two categories: those cases that quickly dismiss the claim on the grounds that the attorney is protected by the traditional privity rule, and those cases that allow a plaintiff to recover—generally through a finding of some type of fraud or conduct more culpable than “mere” negligence.<sup>166</sup> The latter group is

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165. *Id.* Specifically, the court approves the lower court's reliance on *Levine v. Graphic Scanning Corp.*, 87 A.D.2d 755, 448 N.Y.S.2d 692 (1st Dep't 1982); *Cronin v. Scott*, 78 A.D.2d 745, 432 N.Y.S.2d 656 (3rd Dep't 1980), *appeal dismissed*, 52 N.Y.2d 999, 419 N.E.2d 1079, 438 N.Y.S.2d 80 (1981). *Id.*

166. *See, e.g.*, *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385, 590 N.Y.S.2d 201, 203 (1st Dep't 1992) (noting with approval proposition that there will be third party liability in the presence of “fraud or collusion or of a malicious or tortious act.”); *Koncelik v. Abady*, 179 A.D.2d 942, 944, 578 N.Y.S.2d 717, 718 (3d Dep't 1992) (upholding lower court's denial of defendant attorney's cross motion for summary judgment on grounds that there was an adequate allegation of fraud made against him and “attorneys may be liable to nonclients for wrongful acts if guilty of fraud or collusion.”); *Stern v. Consumer Equities Assoc.*, 160 A.D.2d 993, 994, 554 N.Y.S.2d 714, 715 (2d Dep't 1990) (holding “since fraud and conspiracy to commit fraud have been alleged, privity is not required to sustain the action for legal malpractice.”); *Callahan v. Callahan*, 127 A.D.2d 298, 301, 514 N.Y.S.2d 819, 822 (3d Dep't 1987) (allowing wife to maintain cause of action against husband's attorney since “an attorney who induces a non-client to forego the advice of separate counsel in reliance on his own advice may be liable for any false representations made to the nonclient.”); *Green v. Fischbein, Olivieri, Rozenholz & Badillo*, 119 A.D.2d 345, 350, 507 N.Y.S.2d 148, 152 (1st Dep't 1986) (finding tenant stated claim against landlord's attorney for baseless eviction proceedings since “the law firm may not take refuge behind the attorney-client relationship to insulate itself from liability.”); *Kahn v. Crammes*, 92 A.D.2d 634, 635, 459 N.Y.S.2d 941, 943 (3rd Dep't 1983) (finding plaintiff husband stated cause of action for conversion against wife's attorneys and “[a]n attorney may be held liable to third parties for wrongful acts if guilty of fraud or collusion or tortious act.”); *Singer v. Whitman & Ransom*, 83 A.D.2d 862, 863, 442 N.Y.S.2d 26, 27

much smaller, and this balance has given New York courts their reputation for conservatism on this issue.<sup>167</sup>

### 1. *The Traditional Rule in the Lower Courts*

The statement of New York's traditional rule on attorney malpractice was articulated by the lower courts as far back as 1916 in *In re Cushman*:<sup>168</sup>

An attorney is only liable to his client when employed to examine titles to real estate. Where there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of the designated service is to the client and not to a third party. Where no such wrongful element exists, he is not liable for the want of reasonable care and skill at the suit of [anyone] between whom and himself the relation of attorney and client does not in some manner exist. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract.<sup>169</sup>

Most of New York's lower court decisions have followed this traditional rule, declining to find attorney liability to third parties in the case of "mere" negligence, under either a theory of contract or of tort.<sup>170</sup> For example, in *Offenhartz v. Cohen*,<sup>171</sup>

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(2d Dep't 1981) ("[A]n attorney may be liable for injuries sustained by a third party as a consequence of the attorney's wrongful or improper exercise of authority, or where the attorney has committed fraud or collusion or a malicious or tortious act."). See also *Cronin v. Scott*, 78 A.D.2d 745, 746, 432 N.Y.S.2d 656, 658 (3d Dep't 1980), *appeal dismissed*, 52 N.Y.2d 999, 419 N.E.2d 1079, 438 N.Y.S.2d 80 (1981); *Gifford v. Harley*, 62 A.D.2d 5, 7, 404 N.Y.S.2d 405, 406 (3d Dep't 1978).

167. See sources cited *supra* note 14.

168. 95 Misc. 9, 160 N.Y.S. 661 (Sur. Ct. Madison County 1916).

169. *Id.* at 15, 160 N.Y.S. at 665 (citing *National Savings Bank v. Ward*, 100 U.S. 195 (1879) (emphasis added)).

170. In addition, federal courts applying New York law have also tended to follow the traditional New York rule regarding privity as a prerequisite for attorney liability to non-clients. See, e.g., *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1508 (9th Cir. 1993) (applying New York law) ("New York law, with few exceptions, requires privity before a lawyer can be held liable by a party not his client in the absence of fraud, collusion, or a malicious or tortious act."); *Compusort, Inc. v. Goldberg*, 606 F. Supp. 456, 457 (S.D.N.Y. 1985) (applying New York law) ("[T]his would be a particularly inappropriate case in which to grant the motion for reconsideration because it is clear that plaintiff's negligence claim cannot be sustained under New York state law. In the absence of an attorney-client relationship, there can be no action for negligence . . ."). But see *Crossland Sav. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274 (S.D.N.Y. 1988); *Vereins-Und Westbank AG v. Carter*, 691 F. Supp. 704 (S.D.N.Y. 1988); *Jordan v. Lipsig*,

the court was asked to find that an attorney for a woman in a divorce proceeding could be liable to her son for negligence, abduction, and assault because he had advised his client to take her son when she did not have lawful custody.<sup>172</sup> The abduction and assault claims were decided on unrelated theories, but when considering the negligence claim the court found that the child did not have a claim against his mother's attorney because "there was no privity between the defendant and the plaintiff."<sup>173</sup> The court did not elaborate on why it believed privity to be required, nor why the predictability of the harm and the limited scope of potential plaintiffs did not make this a good case for reconsidering the rule.

The court also refused to find a duty to third parties in *Nihalani v. Tekhomes, Inc.*<sup>174</sup> There, allegedly, an attorney advised his client on a business matter. That client, in turn, advised another to breach a contract with the plaintiff and the plaintiff sued the attorney who had rendered the advice.<sup>175</sup> Relying again on the traditional rule, the court found that there should be no liability to the plaintiff since there was no evidence of fraud, collusion or malice.<sup>176</sup>

In another case similar to the "opinion letter" cases of the Court of Appeals, the court in *Associated Factors Corp. v. Paul M. O'Neill Detective Agency, Inc.*<sup>177</sup> weighed the liability of an attorney to a factoring company when the factoring company could not collect accounts from the attorney's client. Although the attorney had prepared an opinion letter concerning the collectability of the accounts and the plaintiff allegedly relied on that letter in deciding to purchase the accounts, the court determined that the absence of privity between the plaintiff and the defendant should bar recovery.<sup>178</sup> Similarly, in *National West-*

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Sullivan, Mollen & Liapakis, P.C., 689 F. Supp. 192 (S.D.N.Y. 1988). For a discussion on these three cases, see *infra* text accompanying notes 231-53.

171. 168 A.D.2d 268, 562 N.Y.S.2d 500 (1st Dep't 1990).

172. *Id.* at 268, 562 N.Y.S.2d at 501.

173. *Id.*

174. 177 A.D.2d 484, 576 N.Y.S.2d 28 (2d Dep't 1991).

175. *Id.* at 484, 576 N.Y.S.2d at 29.

176. *Id.*

177. 146 A.D.2d 728, 537 N.Y.S.2d 212 (2d Dep't 1989).

178. *Id.* at 728, 537 N.Y.S.2d at 213. The court acknowledged that recovery would have been allowed had there been a successful allegation of fraud, malice or

*minster Bank v. Weksel*,<sup>179</sup> the court refused to hold a borrower's attorney liable to a lender for an allegedly negligent statement that the borrower was credit-worthy. The court denied recovery, not surprisingly, by stating that "[i]t is well settled that an attorney may not be held liable for negligence in the provision of professional services adversely affecting one with whom the attorney is not in contractual privity."<sup>180</sup>

In another example with a different problem, *Benedek v. Heit*,<sup>181</sup> the court considered the liability of the defendant attorney where he had drawn up an agreement for his client and a second investor, the plaintiff in this suit. Specifically, the second investor expressed to the first investor's attorney his desire that their agreement not allow for any personal liability for him.<sup>182</sup> Due to the alleged negligence of the attorney in drafting the agreement, the second investor was, in fact, held personally liable and thus sought relief from the attorney.<sup>183</sup> This would seem to be a rather persuasive case for a finding of liability since there was direct communication between the plaintiff and the defendant attorney, and there had been a request for a specific result—hence a clearly foreseeable harm. Yet, the court declined to extend liability because "at no time was the defendant retained as his attorney and there was no billing of the plaintiff by the defendant for any legal services."<sup>184</sup>

*Alpert v. Shea Gould Climenko & Casey*<sup>185</sup> also appeared to have some of the prerequisites for a finding of liability. There, investors brought, *inter alia*, a breach of fiduciary duty claim against the law firms that had prepared tax opinion letters regarding the value of the investments as a tax shelter.<sup>186</sup> But the court rejected the claim, finding that "there is no support for the

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collusion, but found that there was insufficient evidence of any of these elements in this case. *Id.*

179. 124 A.D.2d 144, 511 N.Y.S.2d 626 (1st Dep't), *appeal denied*, 70 N.Y.2d 604, 513 N.E.2d 1307, 519 N.Y.S.2d 1027 (1987).

180. *Id.* at 146, 511 N.Y.S.2d at 628.

181. 139 A.D.2d 393, 531 N.Y.S.2d 266 (1st Dep't), *appeal denied*, 73 N.Y.2d 703, 534 N.E.2d 328, 537 N.Y.S.2d 490 (1988).

182. *Id.* at 394, 531 N.Y.S.2d at 267.

183. *Id.* at 395, 531 N.Y.S.2d at 268.

184. *Id.* at 395, 531 N.Y.S.2d at 267-68. Also persuasive to the court was that the plaintiff, in fact, had his own counsel. *Id.* at 395, 531 N.Y.S.2d at 268.

185. 160 A.D.2d 67, 559 N.Y.S.2d 312 (1st Dep't 1990).

186. *Id.* at 71, 559 N.Y.S.2d at 314.



conclusion that a fiduciary relationship exists between plaintiffs and defendants in the absence of a contractual relationship between them."<sup>187</sup> The finding that there should be no liability was made in the face of allegations that "defendants were aware that their tax opinion letters were to be relied upon by potential investors and that they, in fact, were relied upon by plaintiffs . . . ."<sup>188</sup> The court based its refusal to extend the liability on the fact that the defendants did not directly communicate to the plaintiffs that they were assuming any responsibility to the relying investors.<sup>189</sup> This was exacerbated by the traditional fear of creating liability to an unknown and ill-defined class of disappointed plaintiffs.<sup>190</sup>

In addition to these cases, the courts have also been adamant in refusing to find disappointed will beneficiaries to have a cause of action against the attorney who negligently drafted or executed the will under which they would have received an inheritance. In these cases, including *Deeb v. Johnson*,<sup>191</sup> *Mali v. De Forest & Duer*,<sup>192</sup> *Estate of Spivey v. Pulley*,<sup>193</sup> *Viscardi v. Lerner*,<sup>194</sup> *Rossi v. Boehner*,<sup>195</sup> *Kramer v. Belfi*,<sup>196</sup> *Victor v.*

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187. *Id.* at 73, 559 N.Y.S.2d at 315.

188. *Id.* at 73-74, 559 N.Y.S.2d at 316.

189. *Id.* at 74, 559 N.Y.S.2d at 316.

190. *Id.* Specifically, the court was concerned that "the class of potential investors is not fixed and identifiable." *Id.*

191. 170 A.D.2d 865, 866, 566 N.Y.S.2d 688, 689 (3rd Dep't 1991) ("Contrary to plaintiffs' assertion, the courts of this State have not departed from the privity requirement in the will-drafting cases . . . .").

192. 160 A.D.2d 297, 298, 553 N.Y.S.2d 391, 392 (1st Dep't), *appeal denied*, 76 N.Y.2d 710, 564 N.E.2d 671, 563 N.Y.S.2d 61 (1990) (Defendants "are not liable to the beneficiaries of such will or other third parties not in privity who might be harmed by their professional negligence.").

193. 138 A.D.2d 563, 564, 526 N.Y.S.2d 145, 146 (2d Dep't 1988) ("The well-established rule in New York with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence.").

194. 125 A.D.2d 662, 664, 510 N.Y.S.2d 183, 185 (2nd Dep't 1986) ("We decline to depart from the firmly established privity requirement in order to create a specific exception for an attorney's negligence in will drafting.").

195. 116 A.D.2d 636, 637, 498 N.Y.S.2d 318, 319 (2d Dep't 1986) ("[T]he circumstances herein do not constitute a basis for departing from the general rule that 'absent privity of contract, the simple omission by an attorney to prepare a new will or codicil naming a new beneficiary of some part of the decedent's estate does not, by itself, render the attorney liable to the alleged beneficiary.'" (quoting *Victor v. Goldman*, 74 Misc. 2d 685, 686, 344 N.Y.S.2d 672, 674 (Sup. Ct. Rockland County 1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (2d Dep't 1974))).

*Goldman*,<sup>197</sup> and *Maneri v. Amodeo*,<sup>198</sup> among others, the courts have clung to the traditional rule. It is this reluctance to find liability in even the most "sympathetic" set of circumstances which has led, most directly, to the reputation New York courts have for their traditional approach to this problem.<sup>199</sup> In addition to these illustrative cases, many other appellate division<sup>200</sup>

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196. 106 A.D.2d 615, 616, 482 N.Y.S.2d 898, 900 (2nd Dep't 1984) ("Defendants were retained by the executor only and are not liable to the beneficiaries of the decedents' estates in the absence of fraud, collusion, or malice, none of which is alleged here.").

197. 74 Misc. 2d 685, 686, 344 N.Y.S.2d 672, 674 (Sup. Ct. Rockland County 1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (2d Dep't 1974) ("[N]o appellate authorities in New York have been presented which would permit a deviation, at this stage, from what appears as the New York principle, namely, that absent privity of contract, the simple omission by an attorney to prepare a new will or codicil . . . does not, by itself, render the attorney liable to the alleged beneficiary."). For a discussion on the *Goldman* decision, see Meiselman, *supra* note 9, at 138-39.

198. 38 Misc. 2d 190, 192, 238 N.Y.S.2d 302, 304 (Sup. Ct. Dutchess County 1963) ("An attorney is not liable to a third party for acts performed in good faith and mere negligence on the part of the attorney is insufficient to give a cause of action to the injured third party."). For a discussion of *Maneri*, see Meiselman, *supra* note 9, at 138.

199. See Bell, *supra* note 5, at 1539 (aptly observing that "[a] state's faith in the privity rule can be gauged by looking at how it treats claims by would-be beneficiaries of wills, sympathetic plaintiffs who stand ready and willing to defend testator's rights").

200. See, e.g., *Deni v. Air Niagara*, 190 A.D.2d 1011, 1011, 594 N.Y.S.2d 468, 469 (4th Dep't 1993) ("Plaintiffs, as shareholders, were not in privity by reason of defendant law firm's representation of the corporation or its President."); *Beatie v. DeLong*, 164 A.D.2d 104, 110, 561 N.Y.S.2d 448, 451 (1st Dep't 1990) ("Mere negligence by an attorney giving advice to his client is insufficient to give a right of action to a third party injured thereby."); *Lavant v. General Accident Ins. Co. of America*, 164 A.D.2d 73, 81, 561 N.Y.S.2d 164, 169 (1st Dep't 1990), *appeal dismissed*, 77 N.Y.2d 939, 572 N.E.2d 53, 569 N.Y.S.2d 612 (1991) ("New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client."); *Krasne v. Gedell*, 147 A.D.2d 616, 618, 538 N.Y.S.2d 25, 27 (2d Dep't 1989) ("Under ordinary circumstances, an attorney who does not represent a party may only be held liable to that party upon a showing of fraud or collusion, or a malicious or tortious act."); *Council Commerce Corp. v. Schwartz, Sachs & Kamhi, P.C.*, 144 A.D.2d 422, 424, 534 N.Y.S.2d 1, 2 (2nd Dep't 1988), *appeal denied*, 74 N.Y.2d 606, 543 N.E.2d 85, 544 N.Y.S.2d 820 (1989) ("In the area of legal malpractice, our courts have not extended liability in situations where the negligence caused injury to a third party with whom there was no privity, provided that the attorney is charged merely with simple negligence."); *National Westminster Bank v. Weksel*, 124 A.D.2d 144, 146, 511 N.Y.S.2d 626, 628 (1st Dep't), *appeal denied*, 70 N.Y.2d 604, 513 N.E.2d 1307, 519 N.Y.S.2d 1027 (1987) ("It is well settled that an attorney may not be held liable for negligence in the provision of professional services adversely affecting one with whom the attorney is not in contractual priv-

and trial court<sup>201</sup> decisions consistently cling to the strict privity rule.

ity."); *Burger v. Brookhaven Med. Arts Bldg.*, 131 A.D.2d 622, 624, 516 N.Y.S.2d 705, 708 (2d Dep't 1987) ("Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client."); *Michalic by Nakovics v. Klat*, 128 A.D.2d 505, 506, 512 N.Y.S.2d 436, 438 (2d Dep't 1987) ("[T]he lack of privity between the plaintiffs and the defendant attorneys presents a fatal defect in the plaintiff's pleadings, since New York law does not recognize any liability on the part of an attorney to a nonclient third party for injuries sustained as a result of an attorney's actions in representing his client absent fraud, collusion, or a malicious or tortious act."); *Key Bank of N.N.Y. v. Lake Placid Co.*, 103 A.D.2d 19, 31, 479 N.Y.S.2d 862, 870 (3d Dep't), *appeal dismissed*, 64 N.Y.2d 644, 474 N.E.2d 257, 485 N.Y.S.2d 49 (1984) ("An attorney may be held liable to third parties for fraud or collusion or for a malicious or tortious act. However, the facts here do not support such a cause of action."); *Calamari v. Grace*, 98 A.D.2d 74, 79, 469 N.Y.S.2d 942, 945 (2d Dep't 1983) ("In the area of attorneys' negligence, New York authorities do not extend liability in situations where the act of misfeasance or nonfeasance may cause injury to a third party with whom there is no privity, provided that the attorney is charged merely with simple negligence."); *Grassi v. Tatavito Homes, Inc.*, 90 A.D.2d 479, 480, 454 N.Y.S.2d 471, 472 (2d Dep't 1982), *aff'd*, 58 N.Y.2d 1038, 448 N.E.2d 1356, 462 N.Y.S.2d 445 (1983) ("There was no duty of ordinary care owed plaintiffs by defendant Porco in his role as counsel for the defendant vendors; absent privity between plaintiffs and Porco, the latter is not liable for simple negligence."); *Harder v. McGinn*, 89 A.D.2d 732, 733, 454 N.Y.S.2d 42, 43 (3d Dep't), *aff'd*, 58 N.Y.2d 663, 444 N.E.2d 1006, 458 N.Y.S.2d 542 (1982) ("[T]he complaint fails to set forth any ground upon which defendant attorney could be held liable to plaintiff, whom he never represented."); *Levine v. Graphic Scanning Corp.*, 87 A.D.2d 755, 448 N.Y.S.2d 692, 693 (1st Dep't 1982) ("[A]bsent fraud or other special circumstances, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client."); *Cronin v. Scott*, 78 A.D.2d 745, 746, 432 N.Y.S.2d 656, 658 (3d Dep't 1980), *appeal dismissed*, 52 N.Y.2d 999, 419 N.E.2d 1079, 438 N.Y.S.2d 80 (1981) (rejecting plaintiff's claim because it "makes no reference to the existence of an attorney-client relationship between [the attorney defendant] and plaintiffs."); *Klein v. Clay*, 71 A.D.2d 594, 594, 418 N.Y.S.2d 420, 421 (1st Dep't 1979), *appeal dismissed*, 49 N.Y.2d 759, 403 N.E.2d 184, 426 N.Y.S.2d 479 (1980) ("As to the defendants Clay and Battisti, the attorneys for the seller, there was no showing of fraud, collusion, malicious or tortious act on the part of these defendants attorneys as would subject them to any liability . . ."); *Hahn v. Wylie*, 54 A.D.2d 629, 629, 387 N.Y.S.2d 855, 856 (1st Dep't 1976) (dismissing third party action against defendant attorney).

201. See, e.g., *In re Estate of Newhoff v. Rankow, Cohen & Isaac*, 107 Misc. 2d 589, 598, 435 N.Y.S.2d 632, 638 (Sur. Ct. Nassau County 1980), *aff'd*, 107 A.D.2d 417, 486 N.Y.S.2d 956 (2d Dep't), *appeal denied*, 66 N.Y.2d 605, 489 N.E.2d 1302, 499 N.Y.S.2d 1025 (1985) (finding no case of action for trust beneficiaries against attorney who made unwise investment advice for trust funds since "while the requirement of privity of contract in the attorney-client relationship appears to have eroded in other states, it is still nevertheless, an essential element in New York."); *D & C Textile Corp. v. Rudin*, 41 Misc. 2d 916, 918-19, 246 N.Y.S.2d 813, 816 (Sup.

## 2. *Exceptions to the Traditional Rule*

Yet, there is a much smaller set of cases that are enigmas—cases that find that there may, indeed, be a basis for attorney third party liability. Often, these cases continue to respect the strict rule and uphold the cases that established it. Rather than directly contradict the rule, therefore, they distinguish those precedents on their facts or create exceptions to the rule. However, the result is a set of cases that, when taken as a group, add an element of uncertainty to the law.

In *Baer v. Broder*,<sup>202</sup> the court faced the unusual claim of an attorney who asserted that he was not in privity with the plaintiff in her individual capacity when he had contracted with her in her capacity as executor for her husband's estate.<sup>203</sup> The Appellate Division affirmed a lower court order<sup>204</sup> denying the defendant attorney's motion for summary judgment.<sup>205</sup> The lower court did so on the grounds that privity should not be a bar to recovery.<sup>206</sup> In a stinging attack on the privity shield, the lower court acknowledged that while it could achieve the result of attorney liability by "carv[ing] another exception to the principle of privity,"<sup>207</sup> it preferred a bolder approach. In a complete departure from New York precedent, the lower court advocated that New York "embrace the California rule and make the determination based on public policy involving the balancing of relevant considerations."<sup>208</sup> Such reasoning, if adopted, would have changed the legal landscape in this area quite significantly.

On appeal, the Appellate Division affirmed the lower court's decision, determining that the claim against the attor-

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Ct. N.Y. County 1964) ("Defendant attorneys may have been right or wrong in their advice to their clients. If . . . [the] attorneys were wrong in their advice to their clients, this may mean that their clients are liable to plaintiff. But it does not follow that the attorneys are liable . . . [T]he fact that the attorneys were practicing their profession itself confers a privilege which immunizes them from liability at least on the facts of this case.").

202. 86 A.D.2d 881, 447 N.Y.S.2d 538 (2nd Dep't 1982).

203. *Id.* at 882, 447 N.Y.S.2d at 539.

204. *Baer v. Broder*, 106 Misc. 2d 929, 436 N.Y.S.2d 693 (Sup. Ct. Suffolk County 1981).

205. *Id.* at 935, 436 N.Y.S.2d at 697.

206. *Id.*

207. *Id.* at 934, 436 N.Y.S.2d at 696.

208. *Id.*

ney should be allowed to proceed.<sup>209</sup> The higher court did not adopt the lower court's expansive view, stating that it affirmed on "a different ground."<sup>210</sup> However, the court did not attack the lower court's view as wrong. Instead, the Appellate Division allowed the action to proceed on the grounds that the dual identity of the plaintiff made this a situation that "is unique and demands an exception to the general rule regarding privity."<sup>211</sup> Thus *Baer* created an exception to the privity rule without clarifying the guidelines for creating such exceptions or severely critiquing the lower court's expansive view. Thus, while the facts of *Baer* are extraordinarily conducive for creating such an exception, the circumstances under which this was done leave some ambiguity in the law.<sup>212</sup>

In the more recent *Garelick v. Carmel*,<sup>213</sup> a deed was drawn up that would convey a woman's property to her son.<sup>214</sup> When this was not accomplished, the son sued the attorney. While the transfer of the property would obviously benefit the son, the ordinary privity analysis would preclude attorney liability to the son if there was no privity between them. However, in *Garelick*, the court maintained the privity rule but considered a range of factors in determining whether or not privity existed, and whether an attorney-client relationship might have been established. These factors included the fact that the plaintiff paid the defendant's fees and that the defendant agreed to file the deed at the plaintiff's request.<sup>215</sup> Thus, a court wishing to take an expansive view of *Garelick* may maintain the privity rule but slowly expand the range of actions that may demonstrate that an attorney-client relationship exists. Again, like *Baer*, *Garelick* presents a particularly sympathetic set of facts that justifies the outcome. But, it also fails to provide clear guidance as to how this exception should be reconciled with the strict privity doctrine and where the limitations should be drawn.

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209. *Baer*, 86 A.D.2d at 882, 447 N.Y.S.2d at 539.

210. *Id.* at 881, 447 N.Y.S.2d at 539.

211. *Id.*

212. However, in *Felson v. Miller*, 674 F. Supp. 975, 978-79 (E.D.N.Y. 1987) (applying New York law), the court narrowly interpreted *Baer*, and refused to follow it, saying that it should be limited to its unique facts.

213. 141 A.D.2d 501, 529 N.Y.S.2d 126 (2d Dep't 1988).

214. *Id.* at 502, 529 N.Y.S.2d at 127.

215. *Id.*

In a case similar in some respects to *Garelick*, the court in *Schwartz v. Greenfield, Stein & Weisinger*<sup>216</sup> also found an attorney liable to a third party based on the interactions between them.<sup>217</sup> In *Schwartz*, the plaintiff lender sued the defendant attorneys who had prepared a security agreement for the bankrupt third party.<sup>218</sup> At no time was the attorney retained by anyone other than the bankrupt third party. However, after the security document was prepared, the attorney volunteered to file the security document for the lender to make the lender's loan preferred.<sup>219</sup> However, this was not done, and the defendant claimed injury and asserted the liability of the attorney.<sup>220</sup>

Predictably, the attorney defendants argued that they were not liable on the grounds that they were never in privity with the plaintiffs.<sup>221</sup> The court found that the defendant did have an obligation to the plaintiff based on his voluntary assumption of the duty to file the security agreement.<sup>222</sup> The court distinguished this case from the garden variety third party claim on the basis that here there was a face-to-face commitment by the defendant to serve the plaintiff and a personal commitment to undertake a task for the plaintiff's benefit.<sup>223</sup>

Yet, the court's discussion indicates, in dicta at least, that it views the privity rule with some disfavor.<sup>224</sup> In so doing, the court discusses the trend away from the privity requirement in other jurisdictions and relies heavily on *Stewart v. Sbarro*,<sup>225</sup> a New Jersey case, rather than New York precedent. While the court correctly maintains that this case is different from the typical "disappointed beneficiary" case because of the "face to face" component, many of the factors it weighs in reaching its conclusion are precisely those factors that courts in other jurisdictions weigh in those cases. These include the intent that the defendant's actions benefit the plaintiff; the foreseeability of the

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216. 90 Misc. 2d 882, 396 N.Y.S.2d 582 (Sup. Ct. Queens County 1977).

217. *Id.* at 886, 396 N.Y.S.2d at 584.

218. *Id.* at 882, 396 N.Y.S.2d at 582.

219. *Id.* at 883, 396 N.Y.S.2d at 582. The security agreement was to have been filed pursuant to U.C.C. § 9-401(1) (1988).

220. *Schwartz*, 90 Misc. 2d at 883, 396 N.Y.S.2d at 583.

221. *Id.*

222. *Id.* at 885, 396 N.Y.S.2d at 584.

223. *Id.* at 886, 396 N.Y.S.2d at 584.

224. *Id.* at 885-86, 396 N.Y.S.2d at 584.

225. 362 A.2d 581 (N.J. Super. Ct. App. Div.), *cert. denied*, 371 A.2d 63 (1976).

harm to the plaintiff; and the degree to which the plaintiff's injury was caused by the defendant's negligence.<sup>226</sup>

In *Estate of Douglas*,<sup>227</sup> the Surrogate's Court took a view of attorney liability that also deviated from the traditional view. In *Douglas*, the attorney had been accused of making negligent misrepresentations to those with whom he lacked privity.<sup>228</sup> The court ultimately decided that there was no cause of action in this particular case, but its discussion reflects dissatisfaction with the privity rule. Although the case law appears not to support this observation, the court comments that "[t]he . . . liability of an attorney to third persons not in privity for alleged negligence in performing his legal services to his client may well be . . . the subject of a changing legal trend in New York."<sup>229</sup> Although the court cites no authority for its view that this was occurring in 1980, it posits that a California-type approach may be wise, and that "any decision extending an attorney's liability to third parties should be based on public policy involving the balancing of relevant considerations."<sup>230</sup> While *Estate of Douglas* does not, itself, conduct such a balancing or find liability, the statement that this should occur is another ambiguity in the New York law.

In addition to these cases in which the New York courts themselves introduce some variations in the otherwise clear rule, federal courts applying New York law have also been responsible for several departures from the traditional rule.<sup>231</sup> Three 1988 cases from the Southern District of New York illustrate this pocket of ambiguities.<sup>232</sup> In *Crossland Savings FSB v.*

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226. *Schwartz*, 90 Misc. 2d at 884-85, 396 N.Y.S.2d at 584. For a discussion of other state cases which rely on these factors, see *supra* parts I.B.1-2.

227. 104 Misc. 2d 430, 428 N.Y.S.2d 558 (Sur. Ct. N.Y. County 1980).

228. *Id.* at 432, 428 N.Y.S.2d at 560.

229. *Id.* at 433, 428 N.Y.S.2d at 560.

230. *Id.* at 434, 428 N.Y.S.2d at 561.

231. *But see* *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1507 (1993) (applying New York law) (continuing to respect New York rule that "[i]n the absence of privity, or a relationship approximating privity, an attorney is not liable to a third party for actions taken in furtherance of his role as counsel.").

232. In addition to these cases, see also *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1080 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (justifying liability of attorney to third party because attorneys do not have "license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others").

*Rockwood Insurance Co.*,<sup>233</sup> the plaintiff sued the attorney for a surety for allegedly making negligent statements in promotional material and an opinion letter.<sup>234</sup> The court acknowledged the traditional rule regarding privity.<sup>235</sup> However, the court went on to posit that “[o]n a theory close to that of third-party beneficiary, New York courts have held attorneys liable for misrepresentations to third parties when the lawyer is directed by her client to prepare a document for and on behalf of a third party.”<sup>236</sup> The court, therefore, found that there should not be a bar to third party liability where, as here, the attorney prepares an advice letter which, at the request of the client is addressed to a third party or “expressly” invites the third party’s reliance.<sup>237</sup> The *Crossland* court denied that this will undermine the interests served by the traditional limits on attorney liability. Specifically, the court claimed that this ruling will do nothing to undermine the interests in confidentiality<sup>238</sup> or zealous representation.<sup>239</sup>

In *Vereins-Und Westbank AG v. Carter*,<sup>240</sup> the court again extended liability of an attorney to a non-client for alleged negligent misrepresentations<sup>241</sup> and again found that a claim could be made against the attorneys. The most fascinating aspect of this case, however, was the court’s claim that *Ultramares* should apply to attorneys, and that there was nothing in New York law that would suggest that lawyers should be treated differently from accountants.<sup>242</sup> Thus, after the extensive considerations throughout many jurisdictions of the attorney’s special role, the *Vereins-Und* court found that its review of New York

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233. 700 F. Supp. 1274 (S.D.N.Y. 1988).

234. *Id.* at 1276.

235. *Id.* at 1281 (“Under New York law, attorneys are not liable to the third party for negligent representations even where they prepare documents knowing that third parties will rely upon them.”).

236. *Id.*

237. *Id.*

238. *Id.* at 1283 (“[W]here the opinion letter is addressed to the third party at the direction of the client, any resulting loss of confidentiality is as a result of the client’s own decision . . .”).

239. *Id.* (“[T]he rendering of an opinion to a third party at the client’s direction for the advancement of the client’s interests does not detract in any way from the attorney’s loyalty to her client . . .”).

240. 691 F. Supp. 704 (S.D.N.Y. 1988).

241. *Id.* at 715-16.

242. *Id.* at 712.



law indicated that "there is nothing in either opinion [*Glanzer* and *Ultramares*] to suggest that, absent problems of confidentiality or privilege, lawyers as a class should receive any special treatment . . . ." <sup>243</sup> This may be true, but it is also a significant legal step which was taken quite casually and without clear support. <sup>244</sup>

The final case in this federal "trilogy," *Jordan v. Lipsig, Sullivan, Mollen & Liapakis*, <sup>245</sup> involved facts quite different from the two "negligent misrepresentation cases" and was, indeed, a bit closer to the "disappointed beneficiary" scenario. In *Jordan*, the plaintiff was the husband of the defendant attorneys' client. <sup>246</sup> His wife had retained the firm to bring a medical malpractice action. <sup>247</sup> However, although the attorneys knew she was married, she and her husband were never advised that he could bring a loss of consortium claim against the physicians. <sup>248</sup> Thus, after the statute of limitations ran on his claim, he sued the attorneys for malpractice. <sup>249</sup> The defendant attorneys filed a motion to dismiss the husband's claim on the grounds that he was never in privity with them. <sup>250</sup> Indeed, the husband's "contact" with the attorneys seems to be nil—"he did not retain the Lipsig firm, did not sign a retainer and had no intention for the law firm to sue and collect money on his behalf. . . . [He] never met or spoke with defendants, and no one from the Lipsig firm contacted Mr. Jordan." <sup>251</sup>

The court acknowledged the traditional privity rule and its obligation to follow New York law because it is sitting in diversity. <sup>252</sup> However, in an approach similar to that of the *Baer* court, the *Jordan* court decided to create another exception to the privity requirement to allow recovery since "[a] spouse should reasonably be able to rely on the representation afforded

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243. *Id.* at 712-13.

244. A lengthy analysis of both *Vereins-Und* and *Crossland* can be found in *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Assoc.*, 755 F. Supp 1195, 1200-03 (S.D.N.Y. 1989).

245. 689 F. Supp. 192 (S.D.N.Y. 1988).

246. *Id.* at 193.

247. *Id.*

248. *Id.* at 194.

249. *Id.* at 193.

250. *Id.* at 194.

251. *Id.*

252. *Id.* at 196.

to the injured spouse to inform him or her of his or her potential derivative claim for loss of consortium."<sup>253</sup> While it may be true that the facts of *Jordan* justify the outcome, the court provides no guidance as to how such exceptions should be created or justified.

C. Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood<sup>254</sup>

Fortunately, given the sparsity of high court decisions on point and the anomalies among lower court opinions, the Court of Appeals in *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood* turned its attention to a more careful analysis of the third party liability question and directly raised the "theoretical possibility" of a third party's cause of action against a negligent attorney.<sup>255</sup> Although the court did not clarify how that possibility might become a reality, this case is significant because it acknowledges a willingness of the court to entertain claims that would previously have been barred by a strict application of the traditional rule.<sup>256</sup> Furthermore, the *Prudential* decision is likely to create just enough ambiguity to further future litigation of this issue before the high court—litigation that may force the court to articulate a clear statement of New York's rule that will provide guidance for the future.

*Prudential* essentially revolved around a missing comma and three missing zeros. The plaintiff, Prudential, considered whether it would agree to restructure the debt of United States Lines. It agreed to do this if it received a favorable opinion let-

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253. *Id.* at 197.

254. For additional discussion of the *Prudential* case, see Vincent Martin Bonventre, Survey, *Professional Responsibility*, 44 SYRACUSE L. REV. 453, 458-60 (1993).

255. In *Prudential*, the court ultimately found no liability because of a lack of a causal relationship between defendant's negligence and plaintiff's loss. *Prudential*, 80 N.Y.2d at 386, 605 N.E.2d at 323, 590 N.Y.S.2d at 836.

256. Quite understandably, the case garnered a great deal of attention in the New York legal community. See Rorie Sherman, *A \$31 Million Typo?*, NAT'L. L.J., Oct. 9, 1989, at 2; Norman B. Arnoff & Elizabeth H. Klampert, *Lawyers Professional Liability Litigation*, N.Y. L.J., Mar. 5, 1991, at 1; Andrew Kull, *Zero-Based Morality: The Case of the \$31 Million Typo*, 1 BUS. L. TODAY 11 (July/Aug. 1992); Cerisse Anderson, *Suit Against 2 Firms Allowed to Proceed*, N.Y. L.J., Dec. 10, 1990, at 1; David Margolick, *How Three Missing Zeros Cost Embarrassment and Millions*, CHI. DAILY L. BULL., Jan. 15, 1992, at 2; Gary Spencer, *Potential Liability of Lawyers Widened*, N.Y. L.J., Nov. 20, 1992, at 1.

ter from United States Lines' counsel, Gilmartin, Poster & Shafto.<sup>257</sup> The opinion letter provided to Prudential by Gilmartin represented that certain mortgage statements submitted represented the only existing claims against United States Lines' assets.<sup>258</sup> However, one of these statements erroneously listed the amount of one of the preferred mortgages as \$92,885 instead of the true value of \$92,885,000.<sup>259</sup>

Although the defective document was not prepared by the defendants themselves, the claim was that "the law firm's opinion letter had falsely assured it that the mortgage documents in question would *fully* protect its existing \$92,885,000 security interest."<sup>260</sup> Thus, when United States Lines filed for bankruptcy and Prudential suffered significant financial losses, Prudential attempted to recover from the attorneys for their failure to notice the error and base the opinion letter on accurate information.<sup>261</sup> Thus, in many ways, the facts of this case are very similar to those cases involving accountant liability for defective opinion letters.<sup>262</sup>

The Supreme Court granted the defendant attorney's motion for summary judgment on the theory that there was no duty of care absent any relationship between the attorney and Prudential.<sup>263</sup> The Appellate Division affirmed this decision.<sup>264</sup> However, the Court of Appeals did not take such a narrow view. In a significant departure from decisions that found that the attorney-client relationship requires greater protection of the attorney's duty to the client, the court in *Prudential* acknowledged that while "the defendants in many of the prior cases addressing this issue have been accountants, there is no reason to arbitrarily limit the potentially liable defendants to that class of professionals."<sup>265</sup> This finding that it would be "ar-

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257. The other law firm defendant, Dewey, Ballantine, Bushby, Palmer & Wood, was not a party before the Court of Appeals. *Id.* at 381, 605 N.E.2d at 323, 590 N.Y.S.2d at 836.

258. *Prudential*, 80 N.Y.2d at 380, 605 N.E.2d at 319, 590 N.Y.S.2d at 832.

259. *Id.*

260. *Id.* at 381, 605 N.E.2d at 319, 590 N.Y.S.2d at 832.

261. *Id.* at 380, 605 N.E.2d at 319, 590 N.Y.S.2d at 832.

262. For a discussion of other cases involving accountant liability to third parties, see *supra* notes 107-21, 122-30, 131-41, 142-54 and accompanying text.

263. *Prudential*, 80 N.Y.2d at 381, 605 N.E.2d at 320, 590 N.Y.S.2d at 833.

264. *Id.*

265. *Id.*

bitrary" to treat attorneys differently from other professions reflects the same sentiments Cardozo stated decades ago in *Ultramares*.<sup>266</sup>

However, this attitude also fails to take into account the many ways in which the legal profession—with its duties of loyalty and confidentiality—may differ significantly from other professions and warrant a different outcome. The court addressed those concerns very briefly in rejecting the defendant's claim that "Canons 4 and 5 of the Code of Professional Responsibility, regarding the preservation of client legality and client confidences, argues against imposing liability on attorneys in these circumstances."<sup>267</sup> The court found no conflict here because the attorney's client specifically directed the attorney to provide the reports prepared to the third party.<sup>268</sup>

Thus, in one quick move, the court discounted the defendant's status as an attorney from consideration in the decision as to whether liability should attach. Once that barrier fell, the court turned its attention to deciding whether such a duty, in fact, did arise in this case. The court began by saying that privity itself would not be an absolute requirement.<sup>269</sup> Rather, as in *Credit Alliance* and *Glanzer*, the court was willing to find a duty to a third party even where privity itself did not exist. Instead of actual privity, the court would find a duty if there was "a relationship so close as to approach that of privity."<sup>270</sup> In determining whether such a relationship existed, the court relied

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266. See *supra* text accompanying notes 120-21.

267. *Prudential*, 80 N.Y.2d at 382, 605 N.E.2d at 320, 590 N.Y.S.2d at 833. Canon 4 requires a lawyer to "guard the confidences and secrets of his client," while Canon 5 mandates that "[a] lawyer should exercise independent professional judgment on behalf of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 5 (1980). See also Norman B. Arnoff & Elizabeth H. Klampert, *Use of Alternative Methods to Resolve Fee Disputes*, N.Y. L.J., Feb. 16, 1993, at 3 ("[T]he court soundly rejected Gilmartin's contention that Canons 4 and 5 of the Code of Professional Responsibility, regarding the preservation of client loyalty and client confidences, argued against imposing liability on the firm.")

268. *Prudential*, 80 N.Y.2d at 382, 605 N.E.2d at 320, 590 N.Y.S.2d at 833. However, the court did not indicate how it thought the issue of attorney-client confidences should be weighed in cases that are not so "easy" on their facts.

269. *Id.*

270. *Id.* The court's rationale was not so much a desire to protect the attorney-client relationship or to preserve confidences. Rather, it was motivated by a very practical consideration: "to provide fair and manageable bounds to what otherwise could prove to be limitless liability." *Id.*

heavily on the three factors identified seven years earlier in *Credit Alliance*.<sup>271</sup> Thus, the court ruled that a duty of the attorney to the third party did exist in *Prudential* because the defendant attorney knew that the opinion letter it prepared was to be used by the plaintiff for a specific purpose: the “end and aim” of the opinion letter was to provide information to the plaintiff; the plaintiff relied on the defendant’s opinion letter; and, “by addressing and sending the opinion letter directly to [the plaintiff, the defendant] clearly engaged in conduct which evinced its awareness and understanding that [the plaintiff] would rely on the letter, and provided the requisite link between the parties.”<sup>272</sup>

The *Prudential* court ultimately ruled that, although a duty of care *did* exist, the defendant attorneys did not violate that duty.<sup>273</sup> Nevertheless, *Prudential* moved New York’s law on this issue into a state of flux. *Prudential* opens the “theoretical” possibility of attorney liability, and suggests that there is nothing about the attorney-client relationship that might justify a higher wall of protection for third party malpractice cases involving attorneys.<sup>274</sup> Yet, the decision does not address the “hard questions” about the potential compromise in an attorney’s duty to the client that may come with such liability, nor does it explicitly overrule the lower court decisions that decline to extend liability. Finally, the *Prudential* case is not factually similar to the “disappointed beneficiary” cases which account for so much of this litigation.

Rather, the *Prudential* case succeeds in raising this issue for consideration without the strict and uncompromising view that non-client liability is not in the realm of possibility. Thus, this is the time New York courts should carefully consider the way to answer this question and use *Prudential* as a prelude to creating a consistent and fair response to the issue as newer cases reach the courts.

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271. See *supra* discussion accompanying notes 131-41.

272. *Prudential*, 80 N.Y.2d at 385, 605 N.E.2d at 322, 590 N.Y.S.2d at 835.

273. *Id.* at 387, 605 N.E.2d at 323, 590 N.Y.S.2d at 836. Essentially, the court reasoned that such liability should not be imposed because the attorneys made only “general assurances” to *Prudential* about the information contained in the opinion letter. *Id.*

274. *Id.* at 381, 605 N.E.2d at 320, 590 N.Y.S.2d at 833.

#### D. *New York Courts' Response to Prudential*

In the short time since the *Prudential* decision, the courts of New York have not used the decision as an impetus for a departure from the strict privity rule, viewing the holding narrowly. Through this narrow view, the courts have appeared to take the view that the *Prudential* decision continued to require a relationship that "sufficiently approached privity" as to work no practical change in the attorney's potential liability. However, it is too soon to judge whether this pattern will continue to hold, or how the Court of Appeals will rule when cases involving attorney privity again face it and demand clarification of *Prudential's* "theoretical possibility."<sup>275</sup>

In *Weiss v. Manfredi*,<sup>276</sup> the Court of Appeals modified and affirmed an Appellate Division order concluding that the plaintiff did not demonstrate that there was privity between her minor children and her allegedly negligent attorney to justify the children's cause of action against the attorney.<sup>277</sup> The *Weiss* court relied on *Prudential* for the proposition that the children could not recover because they lacked privity. What the court did not do, however, was discuss its reasoning. In addition, the court did not address the fact that *Prudential*, on its face, does not absolutely require privity but also allows recovery in those circumstances in which there is a relationship that is similar to privity. Hence, *Weiss* was not the vehicle in which the Court of Appeals chose to elaborate on the *Prudential* holding or create any new phases in the development of New York's privity law.

In three lower court opinions dealing with privity issues in contexts other than the attorney-client relationship, the courts cited *Prudential* for the proposition that when privity itself was absent, the claim may still be maintained if the parties establish a relationship similar to privity. In *Port Authority v. Rachel Bridge Corp.*,<sup>278</sup> *Mannix Indus., Inc. v. Antonucci*,<sup>279</sup> and

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275. *Id.* at 382, 605 N.E.2d at 319, 590 N.Y.S.2d at 833.

276. *Weiss v. Manfredi*, 83 N.Y.2d 974, 639 N.E.2d 1122, 616 N.Y.S.2d 325, *reh'g denied*, 84 N.Y.2d 848, 641 N.E.2d 155, 617 N.Y.S.2d 134 (1994).

277. *Id.* at 977, 639 N.E.2d at 1124, 616 N.Y.S.2d at 327. Allegedly, the attorneys had committed malpractice by obtaining an inadequate settlement for her relating to her husband's work-related death. *Id.* at 976, 639 N.E.2d at 1123, 616 N.Y.S.2d at 326.

278. *Port Authority v. Rachel Bridge Corp.*, 192 A.D.2d 489, 597 N.Y.S.2d 35 (1st Dep't 1993) (involving engineering firm).

*Brown v. Neff*,<sup>280</sup> the courts did not assume that *Prudential* gave them the freedom to abandon the requirement of some relationship between the plaintiff and the allegedly negligent defendant. Instead, they viewed *Prudential* as requiring them to make very fact-specific decisions about whether the relationship between the parties was an adequate substitute for privity<sup>281</sup> that should justify recovery.<sup>282</sup>

Thus, the courts after *Prudential* have been slow to abandon traditional notions of limited liability. Nevertheless, the case provides the courts with a tool through which they can re-

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279. *Mannix Indus., Inc. v. Antonucci*, 191 A.D.2d 482, 594 N.Y.S.2d 327 (2d Dep't 1993) (involving window installer).

280. *Brown v. Neff*, 159 Misc. 2d 186, 603 N.Y.S.2d 707 (Sup. Ct. Tompkins County 1993) (involving automobile repairers).

281. See *Port Authority*, 192 A.D.2d at 490, 597 N.Y.S.2d at 36 ("[Plaintiff] failed to produce evidentiary proof . . . to establish that its relationship with [defendant] sufficiently approached the functional equivalent of contractual privity required to hold a professional liable to a non-contractual third party."); *Mannix*, 191 A.D.2d at 483, 594 N.Y.S.2d at 329 ("[W]e conclude that [plaintiff] may not assert a cause of action to recover damages for negligent misrepresentation, since [plaintiff] lacks privity with the defendants and there is not a bond between them so close as to be the functional equivalent of contractual privity."); *Brown*, 159 Misc. 2d at 189, 603 N.Y.S.2d at 709 ("substantial privity" will be sufficient). *Brown*, however, is not directly applicable to the attorney-client context, since the court there was also influenced by the fact that a defective automobile inspection also poses the risk of a physical harm and "privity is not an essential element of the cause of action for intentional or negligent misrepresentation involving the risk of physical harm." *Id.* at 189, 603 N.Y.S.2d at 710. Interestingly, *Brown* also reiterated the traditional policy reason behind New York's strict privity rule:

Our Court of Appeals has recognized that society has a high stake in the continued availability of relatively risky business and professional advice and prognostication. To extend the representer's duty to all who, however indirectly, may learn of the representation and rely upon it, would open the door to fathomless consequences.

*Id.* at 189, 603 N.Y.S.2d at 709. This clearly indicates that, even in the wake of *Prudential*, there is still support in New York's courts for control on expanded liability.

282. In addition, in *Sinclair's Deli, Inc. v. Associated Mut. Ins. Co.*, 196 A.D.2d 644, 601 N.Y.S.2d 625 (2d Dep't 1993), the Appellate Division addressed the privity question in the context of an insurance agent. Although the majority found, on the facts, that the lower court was correct in establishing that the parties lacked "a relationship sufficiently approaching privity," *id.* at 644, 601 N.Y.S.2d at 626, the dissent argued that the "criteria established by the Court of Appeals for finding liability against a 'non-privy' third party," as established in *Prudential* did not warrant such a restrictive application. *Id.* at 647, 601 N.Y.S.2d at 626 (Ritter, J., dissenting).

consider their rule and begin to craft a comprehensive, complete, and non-"theoretical" rule.<sup>283</sup>

### III. Approaches to Attorney Liability to Third Parties<sup>284</sup>

Accepting the premise that the New York courts must establish a clearer rule regarding third-party liability and that this is a good time to do so, it is useful to examine briefly the approaches taken in other jurisdictions to see what may be worth borrowing and what pitfalls may be avoided. The most common approaches taken by other states include the following.<sup>285</sup>

#### A. Third Party Beneficiary Theory

This theory addresses the issue of attorney liability to third parties under the traditional contract doctrine of third party beneficiaries.<sup>286</sup> Jurisdictions following this theory allow recov-

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283. Indeed, in a post-*Prudential* Ninth Circuit case applying New York law, the court faced an argument by a plaintiff that "*Prudential* expands the scope of liability for an attorney to a third party under New York law." *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1509 n.8 (9th Cir. 1993) (applying New York law). Unfortunately, the court did not address this claim, finding that *Prudential* was clearly distinguishable on its facts. *Id.*

284. Of course, the bright line distinctions drawn between these approaches are, in reality, a bit blurry. Most commonly, it is often difficult to determine whether or not an action is being brought in tort, with its focus on foreseeability, or in contract, with its attention to the plaintiff's status as a third party beneficiary. Obviously, a third party beneficiary is likely to be foreseeable, and those who are most foreseeable are likely, also, to be third party beneficiaries. Many commentators have discussed this blurred line between contract and tort. See, e.g., Jonathan M. Albano, Note, *Contorts: Patrolling the Borderland of Contracts and Tort in Legal Malpractice Actions*, 22 B.C. L. REV. 545 (1981); Peter W. Thornton, Note, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOK. L. REV. 196 (1948); Averill, *supra* note 21, at 380 ("[a] negligent malpractice cause of action falls within the 'gray area' between an action *ex contractu* and an action *ex delicti*"); Werner Lorenz & Basil Markesinis, *Solicitors' Liability Towards Third Parties: Back Into the Troubled Waters of the Contract/Tort Divide*, 56 MODERN L. REV. 558 (1993); Note, *Negligence in Relation to Privity of Contract*, *supra* note 18.

285. A full discussion of each of these approaches is beyond the scope of this Article, which focuses primarily on New York law.

286. For a fuller discussion of third party beneficiary theory see Peterson, *supra* note 18, at 772-75; Kleespies, *supra* note 18, at 394-95; Walker, *supra* note 14, at 58-61; Centifanti, *supra* note 18, at 376; Anthony J. Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1111 (1985); Note, *Third Party Beneficiaries and the Intention Standard: A Search for*



ery only to those who are intended third party beneficiaries of the contract between the attorney and the actual client.<sup>287</sup> This involves the traditional contract analysis for third party beneficiaries currently in use in contexts other than those involving attorneys and clients.<sup>288</sup>

### B. *Traditional Negligence Analysis*

Courts following the negligence approach apply the traditional tort analysis that focuses on foreseeability of harm to the third party plaintiff as the cornerstone of liability, regardless of the lack of a contract between the injured third party and the defendant attorney.<sup>289</sup> Jurisdictions vary as to whether the harm in question must be foreseeable to the particular injured plaintiff or merely to the class to which the plaintiff belongs.<sup>290</sup>

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*Rational Contract Decision-Making*, 54 VA. L. REV. 1166 (1968); 7A C.J.S. *Attorney and Client* § 142 (1980); Eisenberg, *supra* note 88, at 1371-73. For an excellent current analysis of third party beneficiary contracts and the liability that comes with it, see Jean Fleming Powers, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*, 1993 UTAH L. REV. 67.

287. See Jenkins, *supra* note 14, at 692 (defining third party beneficiary theory of recovery for negligent will drafting).

288. This contract principle creates some tension regarding whether it is the client's intent to benefit the third party that is relevant, the attorney's intent to benefit the third party, or the mutual desire to benefit the third party. See MALLIN & SMITH, *supra* note 10, § 7.11, at 387 ("The intent to benefit the claimant should be *mutually* that of the client and the lawyer. Whether that agreement is expressed or implied, the attorney's undertaking should be the result of a conscious decision so that the consequences of a duty to a third party can be considered and declined if the conflicts or financial exposure is too great. . . . The claimant's subjective intent is legally irrelevant."); Eisenberg, *supra* note 18, at 140 ("[A]ttorney-third party relationships develop in which it is difficult to say that either the attorney or the client actually intended to benefit the third party; the benefit to the third party is often only incidental to the needs of the client."). This was also, of course, the analysis used in *Lawrence v. Fox*. For a discussion of *Fox*, see *supra* notes 82-86 and accompanying text.

289. For a fuller discussion of the tort claims, see Centifanti, *supra* note 18, at 378-79; Dranoff, *supra* note 18, at 665; Jenkins, *supra* note 14, at 693-94; 7A C.J.S. *Attorney and Client* § 142 (1980).

290. This theory, when applied to attorneys, would parallel the analysis in *MacPherson v. Buick*. For a discussion of *MacPherson*, see *supra* notes 70-81 and accompanying text.

### C. *Balancing of Factors Test*

This test, originated in *Biakanja*,<sup>291</sup> combines many of the essential elements of tort and contract analysis. As established in *Biakanja* and followed, in different ways, by its progeny, the elements to be balanced are: 1) extent to which the transaction between the attorney and the actual client was intended to benefit the plaintiff; 2) foreseeability of the harm; 3) certainty of the injury; 4) close connection between the attorney's act and the injury suffered; 5) moral blame attached to the attorney's conduct; and 6) public policy in preventing future harm.<sup>292</sup> This approach has been criticized for lack of predictability and consistency, as attorneys do not know with certainty how their actions will be weighed in this balance.<sup>293</sup>

### D. *"Assumption of the Duty" Theory*<sup>294</sup>

This theory is based on the premise that the attorney's assumption of a task automatically brings with it the duty to bring that task to completion non-negligently. Therefore, while an attorney has no inherent duty to assist third parties, once the attorney undertakes a task that may harm a third party,

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291. For a discussion of *Biakanja*, see *supra* notes 37-53 and accompanying text.

292. *Biakanja*, 320 P.2d at 19. Some commentators have remarked that this sixth factor is, in fact, superfluous as it applies to individual cases—although it is, no doubt, a primary public policy reason for the demise of strict privity. See Cooper & Kidder, *supra* note 18, at 32. These commentators state:

Seemingly, this very generalized, apparently unrestricted, criteria could interject flexibility, as well as unpredictability into the test. However, in practice, the fifth factor has become little more than a truism. . . . [I]f liability is not appropriate under the first four factors, the policy of preventing future harm does not require the imposition of liability. Although case law does not disregard the efficacy of this factor quite so bluntly, the application of the factor has added little or nothing of substance to the methodology of the balancing test.

*Id.*

293. See, e.g., Peterson, *supra* note 18, at 777 ("Lower courts are left to decide for themselves the weight to be placed on each of the criteria. This lack of certainty inherent in a balancing approach diminishes the deterrent effect gained by extending liability to a broad class of third parties."). But see Dranoff, *supra* note 18, at 665-66 (praising the rationale for the *Biakanja* rule).

294. This approach is proposed and advocated in Eisenberg, *supra* note 18, at 138.

the attorney assumes a responsibility to act non-negligently toward that party.<sup>295</sup>

In addition to these approaches, the courts can also find liability by adopting a more expansive view of the attorney-client relationship by defining "client" in a way that may include those who would otherwise make their claims as third parties.<sup>296</sup> Often, in jurisdictions where the court does not clarify the legal posture in which such a malpractice claim should be made, strategic factors such as the statute of limitations<sup>297</sup> will affect the way in which a plaintiff chooses to characterize a claim.<sup>298</sup>

#### IV. Public Policy Concerns in Creating a Rule of Third Party Liability<sup>299</sup>

Before proposing a rule for the New York courts to follow, it is important to consider not only the approaches taken by sister states, but also the dangers and pitfalls in both expanding and abandoning privity with regard to attorneys. Only with this background will it be possible to outline the rule that will help New York avoid some of the complexities that other states have already addressed and ensure that the approach it takes is an equitable one.

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295. See *White v. Guarante*, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977) ("[A]ssumption of the task of auditing and preparing the returns was the assumption of a duty to audit and prepare carefully for the benefit of those in the fixed, definable and contemplated group whose conduct was to be governed . . ."); *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922) ("[A]ssumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed.").

296. See *Kleespies*, *supra* note 18, at 390-91.

297. See Albert L. Bases & Charles Engros, *Lawyer's Professional Liability: The Experience in New York and Elsewhere*, 1977 F.I.C.Q. 3, 15-17 (1977) (discussing ramifications of statute of limitations on choice of legal theory).

298. In New York, for example, the statute of limitations for a malpractice action sounding in tort is three years. N.Y. CIV. PRAC. L. & R. 214(6) (McKinney 1990). However, if the action is based on a breach of the attorney's contract to perform services, the statute of limitations becomes six years. *Id.* 213(2). Hence, if a cause of action may be pled in either fashion, a plaintiff, in effect, can double the statute of limitations by casting the action as one in contract. See also *Sinopoli v. Cocozza*, 105 A.D.2d 743, 743, 481 N.Y.S.2d 177, 178 (2d Dep't 1984) (discussing variations in tort and contract statutes of limitations in attorney malpractice suits).

299. Full discussion of each of these policy issues is beyond the scope of this Article which focuses, instead, on New York law. For further discussion of these issues, see sources cited *supra* note 18.

### A. Policies in Favor of Respecting Privity

Although many courts now strongly favor abandoning the strict requirement that one be in privity of contract to recover against an attorney for wrongful conduct, there are many policies that weigh against a rapid and unrestrained departure from privity. Most significant is the fear that expanding liability beyond obligation to the actual client may expose attorneys to overly broad liability or potential liability.<sup>300</sup> This has been the traditional rationale for refusing to extend such liability beyond the principal in the transaction.<sup>301</sup> The rule requiring privity is an efficient one—limiting the class of would-be plaintiffs and removing the fear of an overly expansive circle of potential liability.

Opening attorney liability to non-clients may create a potential conflict of interest between the attorney's responsibility to his client and his fears of liability to unknown third parties. There are circumstances under which these interests may be adverse, and the primary obligation to represent the client's interest may be undermined.<sup>302</sup> An attorney may believe, for ex-

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300. This potential has been widely commented on. See sources cited *supra* notes 31-33.

301. Indeed, *National Sav. Bank v. Ward* cited to the traditional English cases whose decisions were motivated by the fear of such extensive, uncontrolled accountability. *Ward*, 100 U.S. at 624 (citing *Kahl v. Love*, 37 N.J.L. 5, 8 (1874) ("There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men could be followed down the chain of results to the final effect."); *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842) ("The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.")). See also Lorton, *supra* note 9, at 1098 ("The perceived inequity of an injured plaintiff with no means of recovery has been tempered by the desire to prevent an uncontrollable deluge of lawsuits.").

302. See Lorton, *supra* note 9, at 1099; HORAN & SPELLMIRE, *supra* note 3, at 1-1 ("The continued vitality of the privity concept in negligence actions against attorneys springs from the unique nature of the attorney-client relationship and the strong public policy considerations that surround that relationship. Those considerations are designed to free the attorney from fear of civil liability to nonclients so that he or she may zealously represent the client."); Jack I. Samet & Richard P. Walker, *Third Party Malpractice Liability: An Ethical Dilemma Nationwide*, NAT'L L.J., Feb. 6, 1989, at 20 ("Theoretically, at least, the attorney's duty of undivided loyalty to clients is undermined to the extent an attorney must also bear a legal duty to third parties."); Lewis, *supra* note 18, at 806 ("[Attorneys] are expected to be zealous advocates on behalf of their clients. Any harm they inflict on third parties is viewed as a consequence of a flawed legal system rather than as the result of professional choices.").

ample, that a certain cause of action is in a client's best interest, or that caution or delay will suit the client's needs. However, if taking those actions may, in some way, increase the likelihood of a third party suit, the attorney may be tempted not to do so.<sup>303</sup>

Relatedly, expanding the scope of potential liability may lead to over-caution in attorneys' dealings with their clients as they seek to act conservatively to avoid placing themselves in situations creating liability to outsiders.<sup>304</sup> Yet, conservative approaches may not necessarily be in the actual client's best interest. Furthermore, such an approach to practice would directly contravene the Model Code of Professional Responsibility, which requires that:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.<sup>305</sup>

Expanding the attorney's obligation can create an enormous financial burden for the legal profession. Any increases in malpractice insurance will be passed on to all clients seeking an attorney's assistance in order to allow an occasional windfall to a third party. In fact, some commentators have expressed concern about the paradox of "double recovery" that occurs where

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303. See Lorton, *supra* note 9, at 1100 ("The fear is that without a privity requirement attorneys will . . . spend time and energy preventing lawsuits to the detriment of their existing relationship with their client.").

304. See Peterson, *supra* note 18, at 769 ("Trust and confidence in attorneys will be compromised if attorneys are forced to take self-protected measures that are contrary to the interests of their clients."); Cifu, *supra* note 11, at 19 ("If a duty of care were owed to non-client third parties, an attorney concerned with his or her own personal liability might, despite the unethical nature of the advice, counsel a client not to proceed with a difficult or unique transaction, out of fear of potential liability to third parties. Similarly, an attorney may understandably be tempted to insert a choice of law clause into a contract between the client and a third party selecting the law of New York or another privity state as the law governing the transaction out of concern for his or her own potential liability . . ."). This rationale was recognized by the New York courts as well. See, e.g., *D & C Textile Corp. v. Rudin*, 41 Misc. 2d 916, 919, 246 N.Y.S.2d 813, 817 (Sup. Ct. N.Y. County 1964) ("Public policy requires that attorneys . . . shall be free to advise their clients without fear that the attorneys will be personally liable to third persons if the advice the attorneys have given to their clients later proves erroneous.").

305. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980).

third party claims are allowed. For example, if A intends to leave an estate worth \$200,000 to B and her attorney drafts the will negligently, the \$200,000 may go to C, the beneficiary of an earlier valid will. If B is allowed to recover \$200,000 from A's negligent attorney, then \$400,000 has been distributed as a result of A's death rather than the true value of her estate.<sup>306</sup>

In addition, such liability may create a disincentive for attorneys to engage in particular types of practice where the liability to third parties may be more expansive. This is particularly true of practice in trusts and estate planning where courts have more liberally construed the attorneys' liability to non-clients.<sup>307</sup> Yet, these are essential services which the legal profession must provide.

Any rule other than a strict privity rule may also expose attorneys to liability to a large group of unnamed plaintiffs unless it is a very carefully crafted and narrow rule.<sup>308</sup> This lack of

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306. See HORAN & SPELLMIRE, *supra* note 3, at 2-4. These commentators also raise the specter of such double recovery leading to collusion among relatives who know that a malpractice verdict against an attorney may, for example, allow several people to receive their decedent's "entire" estate.

307. See, e.g., Cifu, *supra* note 11, at 15. For general discussions of the liability concerns of trust and estate attorneys, see Gerald P. Johnston, *Legal Malpractice in Estate Planning - Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629 (1982); Roy M. Adams & Thomas W. Abendroth, *Malpractice Climate Heats Up for Estate Planners*, TR. & EST., Apr. 1987, at 41; Bogart, *supra* note 18. See also Theberge, *supra* note 18, at 956 ("The areas of title examination and will drafting have been said to generate the greatest number of third party claims and more obviously result in losses to third persons if an attorney is negligent.").

308. The *Ultramares* court acknowledged this danger as well: If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. *Ultramares*, 255 N.Y. at 179-80, 174 N.E. at 444.

See also Peterson, *supra* note 18, at 771; Meehan, *supra* note 18, at 103 ("[T]he legal profession can gracefully take no other position . . . than that its members should practice their profession with the highest degree of competence, diligence and care and should be answerable to anyone for whom they have legitimately undertaken to render their services in that manner. . . . On the other hand, they cannot be expected, for ordinary fees, to undertake a liability to an indeterminate number of possible plaintiffs."). In addition to this liability to an unknown group of third parties is the fear that attorney's liability could be expanded to include liability to a vague notion of "the public at large." See Voorhees, *supra* note 18, at 633 ("I suggest to you that in a very short period of time the courts are going to be measuring your conduct under the very subjective standard of 'fairness' and will be

privity will make it difficult to predict with any certainty the group of plaintiffs to whom attorneys may find themselves responsible.

Finally, the attorney-client privilege may be undermined as attorneys may need to reveal client confidences to prepare a complete defense to charges made against them by an injured third party.<sup>309</sup> As a general rule, a lawyer may only reveal client confidences "with the consent of the client or clients . . . but only after a full disclosure to them."<sup>310</sup> One exception to this rule allows attorneys to reveal client confidences to "establish or collect [the lawyer's] fee or to defend [the lawyer] or his . . . associates against an accusation of wrongful conduct."<sup>311</sup>

This exception is not problematic if the accusation of wrongful conduct is brought by the client himself because the client controls the decision to file a claim and knows that one consequence may be the release of confidential information. But, a claim brought by a third party also, by definition, involves "an accusation of wrongful conduct." Hence, this rule potentially allows release of confidential information in suits by third parties.<sup>312</sup> Yet, there are significant differences between

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asking whether you should, in the 'public interest,' have a duty to someone other than your client. Obviously, this subjective standard will vary from court to court.").

309. See *infra* discussion accompanying notes 310-15.

310. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1980). The basis for the privilege is well established and well accepted. "[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976), *quoted in* Jennifer Cunningham, Note, *Eliminating "Backdoor" Access to Client Confidences: Restricting the Self-Defense Exception*, 65 N.Y.U. L. REV. 992, 992 n.2 (1990).

311. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980).

312. *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-95 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974), addressed the question and decided that an attorney accused by a third party of securities law violation "had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence." *Id.* at 1195. See also Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 443-451 (1990) (discussing reasons for privilege). See also *In re Friend*, 411 F. Supp. 776, 777 (S.D.N.Y. 1975). For a gloomy view of one potential result of this exception, see Henry D. Levine, *Self Interest or Self Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 815 (1977) ("Because the lawyer defendant is free to reveal the confidences of his client, a plaintiff

this case and one in which the client himself actually brings suit—assuming the risk that confidences will be revealed at trial and deciding whether to file suit with this in mind.<sup>313</sup> Since the client has no control as to whether a third party will file suit, he has no control over the release of confidences which may, in certain circumstances, be the attorney's only way to make a complete defense.<sup>314</sup> Faced with this Scylla and Charybdis dilemma, it is incumbent on trial judges to examine evidence *in camera* where possible, procure confidentiality agreements as appropriate, and seal the court records to the extent practicable.<sup>315</sup>

### B. Policies in Favor of Expanding Liability

In contrast, those courts that have chosen to expand liability beyond the limited class of clients have also cited many compelling reasons for their actions, reasons that should persuade the New York courts that a strict privity requirement may not necessarily be in the best interests of the public or of the legal profession. Most fundamentally, failure to expand liability deprives deserving plaintiffs of a source of compensation for what may well be substantial injuries.<sup>316</sup> Often, the attorney will be the only one in a position to make the plaintiff "whole."<sup>317</sup> Er-

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will sue both the lawyer and the client in the hope that, in defending himself, the lawyer will reveal confidences and secrets which will strengthen plaintiff's case against the client . . .").

313. See Cifu, *supra* note 11, at 22-23; Joseph S. McMonigle & Ronald E. Malen, *The Attorney's Dilemma in Defending Third Party Lawsuits: Disclosure of the Client's Confidences or Personal Liability*, 14 WILLAMETTE L. REV. 355 (1978) (thoroughly examining the attorney's need to present a complete defense to a malpractice charge and the ways in which this right conflicts with the essential obligation to preserve client confidences).

314. This issue was addressed in *Vereins-Und Westbank, AG v. Carter*, 691 F. Supp. 704, 714 (S.D.N.Y. 1988) ("[T]o protect himself from a lawsuit brought by a third party, the attorney may be induced to reveal the confidences of his client or otherwise to act in a manner adverse to his client's own interest.") (quoting *Crossland Sav. v. Rockwood*, 692 F. Supp. 1510, 1513 (S.D.N.Y. 1988)).

315. A full discussion of this issue may be found in Jennifer Cunningham, Note, *supra* note 310, at 1035.

316. See Jenkins, *supra* note 14, at 703 ("[T]he privity barrier . . . currently serves to tolerate a critical wrong without a compensating remedy.").

317. The *Biakanja* court recognized this effect when it ruled that "[s]uch conduct should be discouraged and not protected from immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action." *Biakanja*, 320 P.2d at 19.



ecting an impenetrable wall of privity denies those plaintiffs relief.

Third party liability may also be a powerful tool for policing attorney malfeasance or nonfeasance. Just as the spectre of a malpractice action by a client may be an added incentive for attorneys to exercise a high degree of professional care, so too may the possibility of added liability be an impetus for ever greater diligence.

Furthermore, the focus of the compensation scheme should be on blameworthiness. The attorney who is guilty of culpable conduct is more appropriately liable for the cost of the error than the innocent injured third party.<sup>318</sup> Through insurance, an attorney is much better suited to spread the cost of his misconduct than the third party plaintiff.<sup>319</sup> In addition to insurance, an attorney is in a position to charge higher fees for those services that may lead to greater liability, thus helping to offset a predictable, potential loss.<sup>320</sup> Relatedly, the attorney is often the one with the lower avoidance costs. Indeed, a third party is often entirely powerless to avoid the cost. Therefore, the cost of the error should be placed on the one who is better able to avoid the occurrence in the first place.<sup>321</sup>

There are also situations in which the actual client will have no incentive to bring an action in law or before a disciplinary board against the attorney for his conduct. This occurs most often in the trust and estate fields where the malpractice is often not discovered until the actual client has died. Therefore, the only one who will be in a position to bring suit will be a

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318. See Eisenberg, *supra* note 18, at 128; Centifanti, *supra* note 18, at 371 ("It is unjust to force an innocent third party to bear the burden of another's actions, whether the rationale be privity or an equally esoteric concept of another name.").

319. James Holman, Comment, *Attorney Malpractice: A "Greenian" Analysis*, 57 NEB. L. REV. 1003, 1014 (1978).

320. See, e.g., Probert & Hendricks, *supra* note 18, at 721; Peterson, *supra* note 18, at 771; Eisenberg, *supra* note 18, at 128; Holman, *supra* note 319, at 1014.

321. See Peterson, *supra* note 18, at 766-67. One author proposes that economic efficiency should be the analytical framework for evaluating any system allocating the burdens resulting from attorney negligence. Leonard E. Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach*, 75 Ky. L.J. 793, 796 (1987). See also Dranoff, *supra* note 18, at 669 ("[T]he plan [liability to non-clients] would place the costs of negligence squarely on the shoulders of those persons who are best able to prevent injury and spread risks and costs.").

third party.<sup>322</sup> Not only does expanded liability provide an avenue for that third party to seek redress; it also provides a financial incentive—the possibility of recovery—for such claims and may foster more vigorous litigation by those with an incentive to do so.<sup>323</sup>

In a different vein, the liability of many other professionals has been expanded to include third parties.<sup>324</sup> Expanding attorney liability will allow for a greater degree of consistency and

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322. See Eisenberg, *supra* note 18, at 131. See also M. Eisenberg, *supra* note 88, at 1394 ("The testator cannot sue the attorney because the testator has died. The testator's estate cannot sue the attorney, because the estate has not been injured. Even if the estate could sue the attorney, its damages would be measured only by the testator's disappointed expectation, which would be almost impossible to measure, and in any event the recovery would end up in the hands of the estate rather than those of the would-be legatee.").

323. Dranoff, *supra* note 18, at 669. See also Powers, *supra* note 286, at 105 ("The executor or administrator is not likely to have the same incentive as the disappointed beneficiary to sue the attorney. In fact, the responsibilities of the executor or administrator to preserve the estate may preclude the executor from bringing suit.").

324. See, e.g., Probert & Hendricks, *supra* note 18, at 720 ("Lawyers are not being signaled out for this development. Various immunities are disappearing in several personal injury areas, most notably, governmental, charitable, and intrafamily. Various enterprises are experiencing added responsibilities beyond their clients and customers for causing economic loss. Among the first to be hit was a 'public weigher.' . . . Later, it was a notary, and now along with lawyers come accountants, surveyors, title abstractors, engineers, architects, and building contractors."). Often, commentators compare the liability of attorneys to that of accountants. Although many of the same concerns regarding unlimited liability and compromise of loyalty to the client exist with accountants, it is clear that the courts continue to treat attorneys much more gently. See Lawson & Mattison, *supra* note 19, at 1324-25 ("[O]f the fourteen jurisdictions explicitly to consider third party attorney liability for negligent misrepresentation since 1968, at least nine, and possibly eleven . . . have retained the privity standard. In contrast, only thirty percent of the jurisdictions that have considered the issue since 1968 have retained the privity rule in cases involving accountants."). See also S.S. Sanbar & Leonald Pataki, *Professional Liability: Malpractice of Attorneys, Accountants, Architects, and Engineers*, 3 OKLA. CITY U. L. REV. 689 (1979); Lewis P. Checchia, Note, *Accountants Liability to Third Parties Under Bily v. Arthur Young & Company: Does a Watchdog Need Protection*, 38 VILL. L. REV. 249 (1993); Howard B. Wiener, *Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation*, 20 SAN DIEGO L. REV. 233 (1983); Mark D. Boveri & Brent Marshall, Note, *The Enlarging Scope of Auditors' Liability to Relying Third Parties*, 59 NOTRE DAME L. REV. 281 (1983); Besser, *supra* note 156; Marinelli, *The Expanding Scope of Accountant's Liability to Third Parties*, 23 CASE W. RES. L. REV. 113 (1971); R. James Gormley, *The Foreseen, the Foreseeable, and Beyond - Accountant's Liability to Nonclients*, 14 SETON HALL L. REV. 528 (1984); Stephen P. Younger, *Commercial Cases Cover Wide Range of Subjects*, N.Y. L.J., Nov. 2, 1992, at 5-6.

eliminate the special—and perhaps unnecessary—privileges that attorneys enjoy. Although “there are distinctive aspects of lawyer-client relationships for courts to consider,”<sup>325</sup> these may not justify completely different treatment for members of the legal profession vis à vis their colleagues in other professions.<sup>326</sup>

Finally, and perhaps most importantly, knowing that there is a possibility of third party liability may be an incentive for an attorney to be more cautious and avoid “accidents” in the first place. Just as the spectre of a malpractice action may be an added incentive for attorneys to exercise a high degree of professional care, so too may the possibility of added liability be an impetus for ever greater diligence. If one of the goals of a liability scheme is, in fact, to be deterrence of the conduct in question, then “raising the stakes” on committing the offense rather than eliminating liability seems the wiser course.<sup>327</sup>

## V. Toward a Rule of Reason and Predictability

### A. Guidelines for Creating an Attorney Liability Rule

Because there are so many conflicting interests to weigh in setting a sound liability rule, the court must take into account a number of factors to ensure that the rule created is not over inclusive or underinclusive. First, it must be a rule of foresee-

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325. Probert & Hendricks, *supra* note 18, at 721.

326. Indeed, commentators have viewed this special protection quite cynically. See, e.g., Note, *Attorney Malpractice*, *supra* note 69, at 1312 (“The majority of decisions [maintaining privity] reflect a superficial analysis that is almost certainly colored by the fraternal concern of the judiciary for practicing members of the bar.”). Less cynically, it has also been suggested that overeagerness to protect attorneys more than comparable professionals may actually *hurt* the legal profession. See Arnoff & Klampert, *supra* note 267, at 3 col. 1 (“[W]here professionals are being judged, all are to be treated equally, with attorneys enjoying no special status that would jeopardize the public’s confidence in the integrity of the legal profession.”); Peterson, *supra* note 18, at 380 (“[C]ourts may improve the public image of the profession by expanding liability to third parties. By doing so, the legal profession can project an image of fairness . . . to the public since attorneys will be made to answer for the consequences of their negligence more often.”); Theberge, *supra* note 18, at 996 (“The legal profession can ill afford the stigmatizing effect of appearing to shield its members at the expense of those who reasonably rely on their skills.”).

327. See, e.g., Hyland, *supra* note 11, at 147; Peterson, *supra* note 18, at 768. But see Cifu, *supra* note 11, at 23 (“It is unlikely, however, that attorneys will simply improve the quality of their lawyering. Rather they will no doubt turn to malpractice insurers to cover the increased risk of loss.”).

ability that allows attorneys to predict, at the time they engage in a transaction or retain a client, the parties to whom the courts will hold them liable and the scope of that liability. It must adopt foreseeability as its cornerstone, since compensation for unforeseeable injuries will neither assist in deterrence nor address the blameworthiness of the attorney.<sup>328</sup>

The rule should not be crafted for the sympathetic "disappointed beneficiary" problem that often instigates such an expansion.<sup>329</sup> Instead, it should be created by considering the more difficult questions posed by cases a bit further down the "slippery slope" and be a rule that will fit *all* circumstances, and not just the "easy" will drafting problem.<sup>330</sup> Although it is often said that hard cases make bad law, easy cases may make worse law since they do not require the courts to consider the consequences of a rule that is "safe" in easy cases.<sup>331</sup> For example, it is relatively simple to decide that a disappointed will "beneficiary" should be allowed to recover against a negligent attorney.<sup>332</sup> But what about the cases in which the link is less direct or limited? For example, if an attorney for a construction company knows that the steel used for the foundation of a building built by his client is substandard because an agent of the steel company bribed the client to accept its bid, should the attorney be liable to future, unknown victims should the building collapse?<sup>333</sup> Or, if a defective will means that a bequest will not be

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328. See Peterson, *supra* note 18, at 768.

329. As explained in Probert & Hendricks, *supra* note 18, at 716, the will-drafting cases are at "one end of a continuum with [their] harmony of interests of lawyer, non-lawyer, and client." Because there is often little conflict involved in these cases, many of the more difficult cases may remain unaddressed.

330. For an explanation of how many courts have relied only on the will drafting scenario as they formulate their ruling, see Lorton, *supra* note 9, at 1104-05.

331. For a discussion of further dangers of using the "will beneficiary" case as the paradigm for attorney liability, see HORAN & SPELLMIRE, *supra* note 3, at 2-4 ("Problems exist because there is no requirement that the client be dead, be incompetent, or be under some form of legal inability as a prerequisite to the maintenance of a suit by the nonclient but intended beneficiary.").

332. See, e.g., *Needham v. Hamilton*, 459 A.2d 1060, 1062-63 (D.C. 1983) (explaining special features of will cases that make them suitable for recovery by third parties).

333. Currently, section 4-101(C)(3) of the Model Code of Professional Responsibility, as followed in New York, provides that an attorney *may* reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1992). This leaves the decision whether to disclose such information to the lawyer's indi-

passed on to a charitable hospital, should a patient who would have been served by that hospital if the funding were available, be allowed to maintain a cause of action against the negligent attorney? Arguably, this last scenario is so tenuous as to make recovery laughable. But, conceptually, it is a difference of mere degree, not kind.

The rule must protect the attorney's primary responsibility to the client and do as little as possible to undermine the attorney-client relationship in any way.<sup>334</sup> Thus, the rule should be crafted with an eye toward any way in which it might—directly or indirectly—give attorneys incentives to compromise their client's wishes.<sup>335</sup>

Finally, and perhaps most importantly, a sound rule must insure that those in adversarial relationships to the attorney's client are never found to have grounds for a suit. To date, courts do not allow malpractice claims to be advanced by direct adversaries.<sup>336</sup> However, there can be instances where those

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vidual discretion, and failure to disclose under the permissive guidelines of this rule has not been held to be grounds for imposition of liability. *Cf. Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) and its progeny (holding psychiatrist liable for injuries to third party resulting from failure to warn victim of threats to her life made by patient.). This rule is also silent as to wrongful acts that are only civilly culpable and makes no mention of wrongful acts that will result in strictly economic harm. For a fuller discussion of the "duty to warn" issue as it pertains to attorneys, see, e.g., Gillers, *supra* note 13, at 11; Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1090 (1985); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982); J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976). Concern about this issue is also raised in Voorhees, *supra* note 18, at 633; Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT AND INS. L.J. 355 (1986); Timothy J. Miller, Note, *The Attorney's Duty to Reveal A Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582.

334. For a useful discussion of the attorney-client privilege see Callan & David, *supra* note 333, at 333-43.

335. See *supra* discussion accompanying notes 302-06.

336. See MALLIN & SMITH, *supra* note 10, § 7.12, at 890 ("Obviously, the rule would not apply to an adverse party since 'injury' or adverse consequence is often the objective of the attorney's retention."); Peterson, *supra* note 18, at 764 ("Courts universally refuse to extend a duty to third-party adversaries . . . since to do so will create conflicts of interest, disrupting the attorney-client relationship."); Cahill, *supra* note 18, at 647 ("No duty can be given the adversary in a court of law, for if a duty was extended, the attorney could not effectively represent his client."). How-

who are not direct adversaries may still have interests that can compromise the needs of the client. For example, a beneficiary of a will may have an interest in having a will drawn up and executed quickly, while the testator's best interest may be served by a more lengthy analysis of the issues and options available.<sup>337</sup> Recovery by such plaintiffs would place the heart of the attorney-client relationship in jeopardy by undermining the duty of loyalty in a very direct way.

### B. *The Proposed Rule*

A rule extending attorney liability to those who are not their clients should operate on the assumption that such an expansion is not a desirable goal and that the dangers such liability pose to the attorney-client relationship may be too grave to outweigh the otherwise laudable goals of expanded liability. The view of the *Prudential* court, while helpful in removing the blanket protection for attorneys merely because of their status as attorneys, may be dangerous if taken to its extreme. It fails to consider that there are features unique to the legal profession that must be respected in creating a liability rule.

The ideal rule governing attorney liability to non-clients should be a two-pronged approach, with a different standard for those cases in which the attorney's underlying conduct actually constituted malpractice *toward the actual client*, and those cases in which a third party was harmed, *but the client was not*. The rule should be most "liberal" in the first class of cases. It is in the cases where malpractice was committed against the attorney's client that the interest of the client and the interest of the third party are least likely to be at odds, since, obviously, the client has no interest in having malpractice committed. Furthermore, allowing extended liability in this class of cases may have the beneficial side effect of giving the attorney an additional incentive to avoid negligent conduct in dealings with the primary client.

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ever, there are other causes of action that an adversary may still be allowed to bring. See *infra* note 348.

337. This scenario was actually litigated in *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988). The court decided that "the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client." *Id.* at 736.

In this first class of cases, the ideal rule should make the attorney liable to the third party for negligent acts only if the following three conditions exist:

1. The injured party was a member of an identified class whose injury could be foreseen by a reasonable attorney exercising due care. While the plaintiff's *individual* identity need not be known to the attorney at the time of the negligent conduct, the plaintiff must belong to a well defined *group* of plaintiffs whose identity should be known to the attorney.<sup>338</sup> For example, the classes of "all those who would not inherit under this will if it were invalid," or "all those who will rely on my certification that the title to this property is valid" will suffice. Of course, so will those situations in which a potential plaintiff's actual identity is known, such as "my daughter, Jane Doe, to whom I bequeath one third of my estate."

2. The plaintiff can bear the burden of proving that negligence was actually committed against the original client.<sup>339</sup> Because the actual client may never bring an action, a prior judgment against the attorney in a suit by the client should not be a prerequisite to recovery. But, if there has been no prior judgment, it is the burden of the third party plaintiff to prove that such recovery would have been justified. Such a "trial within a trial," while cumbersome, is a necessary part of proving the plaintiff's case. For, if malpractice against the actual client cannot be proven, it would be difficult to justify any award of damages to the third party. Similarly, if the actual client had brought a malpractice action against the attorney

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338. However, as a practical matter, courts may not be over-eager to find liability if that "well defined" group is too large. See R. James Gormley, *The Foreseen, the Foreseeable, and Beyond - Accountants Liability to Nonclients*, 14 SETON HALL L. REV. 528, 540 (1984) ("[T]he opinions reveal that courts tend to be more comfortable with identifying one or a few specific *persons* than with identifying a specific limited *class*."); cf. Lewis, *supra* note 18, at 811 ("identifiable third parties need not be specifically identifiable to the individual attorney. Rather, they belong to a class of third parties whom attorneys should generally foresee would sustain injuries if the attorneys negligently perform their legal duties.").

339. One interesting proposal has been to require a consultation with an expert on the issue of liability as a pre-filing requirement in a legal malpractice case. Arguably, this would provide some protection to an attorney from frivolous claims brought by a client or by a non-client and advance the interests of judicial economy and the preservation of the reputation of attorneys whose work is not negligent. See Arnoff & Klampert, *supra* note 267, at 3 col. 1.

and lost on the merits, recovery by third parties should, obviously, be barred.<sup>340</sup>

3. The plaintiff can bear the burden of proving that there is no conflict between the plaintiff's claim and any interest or potential interest of the actual client.<sup>341</sup> That is, the plaintiff's *prima facie* case should demonstrate that there is no manner in which the conduct he claims the attorney should have performed would have conflicted with the actions the attorney actually undertook on behalf of the client. Similarly, an attorney should be able to raise the existence of such a conflict as part of a defense. This focus on the adversariness of the relationship between the client and the plaintiff has not been a significant part of the traditional jurisprudence on this question.<sup>342</sup> Yet, it seems an appropriate factor on which the question of recovery should turn. In any circumstance where the attorney is committed to serve client A, serving the conflicting interests of third

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340. This would not be the case, however, if the loss were on mere procedural grounds.

341. In *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987), the court appears to express a belief that in *no* circumstances will a plaintiff be able to meet such a burden. As that court reasoned, "To allow indiscriminate third party actions against attorneys would of necessity create a conflict of interest at *all* times, so that the attorney might well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself." *Id.* at 638 (citing *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (Ct. App. 1976) (emphasis added)). However, this concern appears to be exaggerated. Rather, the issue raised here goes more to the proper *difficulty* a plaintiff would have meeting this burden rather than to the *impossibility* of so doing.

342. Of course, it is nearly uniformly true that direct adversaries have no malpractice claim against counsel for the opposing side. After all, "[t]o hold that the lawyer has a duty to non-clients who suffer loss as a result of the lawyer's actions as an advocate would be inconsistent with, and would frustrate the ethical policy behind the duty of zeal that the lawyer owes his client." Kleespies, *supra* note 18, at 383. *But see* John H. Beers, Note, *Attorneys Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775 (1979) ("explor[ing] the desirability of holding attorneys liable in tort to their clients' adversaries where frivolous lawsuits have been conducted."). *See also* Davis, *supra* note 18, at 417. However, it is those situations in which there is no direct adversarial relationship but potentially subtle conflicts in goals with which I am most concerned. For a good discussion of the attorney's liability to adversarial parties, see generally E. Wayne Thode, *The Groundless Case - The Lawyer's Tort Duty to His Client and to the Adverse Party*, 11 ST. MARY'S L.J. 59 (1979); Ronald E. Mallen & James A. Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 WILLAMETTE L. J. 387 (1978).



party B would, by definition, mean that A was not being served professionally.<sup>343</sup>

By containing fewer variables than the unwieldy *Biakanja* test, this rule will allow more predictability in its application and ensure that an attorney will know in advance which acts may have potential for more widespread liability. By allowing recovery to those plaintiffs in identifiable classes rather than only to those individually identifiable plaintiffs, this rule will also be more equitable by eliminating the often semantic debate as to whether the attorney actually knew the individual plaintiff. Placing the burden of proving a lack of conflict between the client and the plaintiff on the plaintiff should afford the attorney-client relationship a good deal of protection that is not available under the schemes currently used by the courts to resolve this issue. Requiring the plaintiff to prove such a lack of conflict and allowing the defendant to raise the presence of conflict as a defense should be effective in weeding out those cases in which eliminating privity poses the most danger.<sup>344</sup>

In the second set of cases, those where there is no provable injury to the original client, the court should be extraordinarily careful about allowing recovery. These are cases in which the possibility of a conflict of interest between the client and the third party are the greatest. If no recognizable harm was done to the actual client, there is a greater possibility that there will

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343. Determining whether there is, in fact, a conflict of interests between the third party and the attorney will often be a difficult one, and the presence of a conflict may not exist at the time that the attorney acted but arise later as the consequences of that action develop. An example of such a tricky case can be seen in *Metzker v. Slocum*, 537 P.2d 74 (Or. 1975). In that case, a minor child sued the attorney who had allegedly perfected her adoption, but negligently failed to do so. Ten years later, this was discovered when the parents separated and no provision was made by the divorce court for the child's support because her "parents" technically had no legal relationship to her. *Id.* at 75. In this harsh case, at the time of the alleged adoption there would appear to be no conflict in the interest of the child (to be adopted) and the "parents" (to adopt). However, ten years later, the interests of the child (to be supported) and the "parents" (harshly put, to be free of a significant financial obligation) do conflict. Hence, this is a more difficult balance for the court to strike. As a general rule, however, the courts should assume that there is a conflict and rule accordingly if the lack of conflict is not firmly established.

344. Nancy Lewis has suggested that an additional safeguard to help weed out those third party suits without merit could be creating penalties or assessing punitive costs against third parties who bring unwarranted claims. See Lewis, *supra* note 18, at 808-09.

be a conflict between the interests of the clients and the interests of the injured third party.<sup>345</sup>

In these cases, the court should adopt a much more restrictive view. Here, liability should exist only where there is fraud, collusion or malice on the part of the attorney. This is conduct more blameworthy than "mere" negligence; thus it should not go unsanctioned.<sup>346</sup> However, the interest in protecting the attorney-client relationship from interference precludes expansion beyond this limit where no harm befell the actual client. To do so would create liability for actions that were, arguably, not actions the attorney contemplated undertaking when service to the client began.

Of course, nothing in the adoption of these more narrow grounds for recovery should limit the right of aggrieved parties to file actions against attorneys on the grounds of malicious prosecution or abuse of process.<sup>347</sup> Indeed, these claims are quite compatible with allowing recovery for injuries resulting from fraud, collusion, or malice because they seek to sanction attorneys for violating independent duties they owe to the courts, adversaries,<sup>348</sup> and the general public that do not depend

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345. This would include situations in which an attorney, for example, advises a client to breach a contract.

346. In addition, attorney liability to a non-client for deceit or collusion "does not purport to put an extra liability on a person sued merely because he happens to be admitted to the bar." 6 N.Y. JUR. 2D *Attorneys at Law* § 117 (1980). Rather, it imposes that liability that would attach to *anyone* guilty of the same offense.

347. While a discussion of these claims is beyond the scope of this paper, *see, e.g.,* *Drago v. Buonagurio*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); *Board of Educ. v. Farmingdale Classroom Teachers' Ass'n, Inc.*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975). Of course, courts are still wise to exercise some caution in making malicious prosecution cases too easy to bring. *See Porterfield v. Saffan*, 7 A.D.2d 987, 987, 183 N.Y.S.2d 896, 897 (1st Dep't), *aff'd*, 7 N.Y.2d 816, 164 N.E.2d 716, 196 N.Y.S.2d 696 (1959) ("[C]onsiderations of public policy have resulted in restricting the instances in which the mere bringing of a lawsuit by one party lays the foundation for the bringing of another lawsuit by the one sued.").

348. Also, recovery should continue to be allowed against attorneys to compensate their adversaries for failure to comply with procedural requirements. *See, e.g.,* *Kahn v. Stamp*, 52 A.D.2d 748, 749, 382 N.Y.S.2d 199, 200 (4th Dep't 1976) (ordering defendant's attorney to pay \$250 to plaintiffs for inconvenience caused by defendant's failure to file timely answers to interrogatories.). As long as the defendant, of course, does not have to pay the fee personally, this is a system that poses no harm to the duty of the attorney to the client, and even helps promote the performance of that duty by ensuring that the attorney perform his responsibilities to the client. Similarly, in *Gottlieb v. Edelstein*, 84 Misc. 2d 1053, 1057-58, 375

on the attorney's conduct toward his own client for their source.<sup>349</sup> The broad range of alternative remedies against negligent attorneys should not be affected by a changing third party liability scheme.<sup>350</sup>

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N.Y.S.2d 532, 536-37 (Sup. Ct. Queens County 1975), the court ordered defendant's attorney to compensate the plaintiff and her attorney for expenses they incurred in a proceeding in which the attorney did not advise them or the court that the defendant was deceased. *See also* Sommer v. Fucci, 47 A.D.2d 771, 771, 365 N.Y.S.2d 249, 249-50 (3d Dep't 1975) (allowing penalty to be imposed on plaintiff's former attorney in favor of the defendant where plaintiff's default was caused by neglect by plaintiff's attorney). In Green v. Badillo, 119 A.D.2d 345, 507 N.Y.S.2d 148 (1st Dep't 1986), the court also allowed an action to be maintained against a defendant attorney for intentional infliction of emotional distress on the plaintiff by filing lawsuits against plaintiff with no legal basis. The court allowed this claim to proceed because, "[i]f plaintiff can show, as he alleges, that there was no legal basis for these proceedings, the law firm may not take refuge behind the attorney-client relationship to insulate itself from liability." *Id.* at 350, 507 N.Y.S.2d at 152.

349. Although these causes of action are beyond the scope of this paper, excellent discussions of these claims can be found in HORAN & SPELLMIRE, *supra* note 3, at 1-1 to 1-2. In addition, other claims that can be made against an attorney by a third party *not* directly linked to the attorney's malpractice to a client include conspiracy to defraud, defamation, or invasion of privacy. *Id.* at 3-1. *See also* MALLIN & SMITH, *supra* note 10, §§ 6.1 to .28; Richard H. Underwood, *Taking and Pursuing a Case: Some Observations Regarding "Legal Ethics" and Attorney Accountability*, 74 Ky. L.J. 173 (1985); Beers, *supra* note 342; Paul Greisen, Note, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897 (1977). Because they do not "piggy-back" on the claims of the attorney's client, there seems to be less danger in allowing these claims to continue. In combination with the rules of professional conduct governing fair treatment of adversaries and the tribunal, these actions would seem to mitigate the danger that "knowledge that a nonclient generally cannot sue reduces the attorney's incentive to discharge his duty of fairness to his opponent." Dranoff, *supra* note 18, at 665.

350. *See* John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235, for a thoughtful discussion of the scope of legal opinion liability. As Prof. Freeman points out, viewed expansively

an improvidently rendered opinion may lead to: action by state disciplinary authorities or federal agencies having disciplinary powers; a suit claiming negligent malpractice or negligent misrepresentation; a common law fraud action; claims under the federal and state securities laws; penalties under the Internal Revenue Code; a suit under the Racketeer influence and corrupt organizations ("RICO") statute; an action alleging an unfair trade practice; a demand for punitive damages; a criminal prosecution; a claim for aiding and abetting a breach of duty; a civil conspiracy suit; or a breach of fiduciary duty claim.

*Id.* at 235-39 (citations omitted). As Freeman also points out, many of these causes of action are potentially more damaging to attorneys than a malpractice action, third party or otherwise, because they may often not be covered by the attorney's malpractice policy. *Id.* at 281. *See also* Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 BUS. LAW. 1295 (1978).

## VI. Conclusions

The issue of attorney liability to third parties is one that, although debated for over a century, is still far from being resolved, particularly in New York. This proposed rule, with its focus on the relationship between the client and the third party—as opposed to merely the attorney and the third party—does more than the existing rules to protect the primary responsibility of the attorney to the client. At the same time, it does not shield attorneys from the consequences of their negligent conduct. Adoption of such a rule when *Prudential's* “theoretical possibility” surfaces would help bring the issue to a logical conclusion that serves the interests of attorneys, clients, aggrieved third parties, and the public at large.