DUTIES TO THIRD PARTIES

By

William J. Wernz, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (May/June 1992)

When Lord Brougham contemplated his defense of Queen Caroline against a possible charge of adultery, he coined a classic statement of the lawyer's duty in an adversarial system: "An advocate, in the discharge of his duty, knows but one person in the world, and that person is his client."[Ftn1] In an equally classic, but more tempered, formulation, Canon 7 of the Code of Professional Responsibility stated, "A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law." In classical lawyer mythology the advocate's zeal for a client was restrained only by duties to the court and by the law.

Third parties, in the advocate's world, were foes or strangers. The lawyer's duties to third parties were limited and negative: do not advise them, defraud them, or commit crimes against them.

In the last decade, however, lawyers' duties to third parties, both under the Minnesota Rules of Professional Conduct and in malpractice, have been considerably enhanced. These enhancements are outlined in this article, in the areas of ethics, malpractice liability, and the special duties of lawyers representing fiduciaries. (Rights and duties under Rule 11 and its kin are not discussed here.)

Ethical Duties

Five rules or amendments to the Minnesota Rules of Professional Conduct since 1985 have enhanced third party rights and protections. These provisions had no counterparts, or very weak counterparts, under the predecessor Code of Professional Responsibility. Moreover, the Minnesota versions of these rules are either without ABA Model Rule counterparts or are stronger than the counterparts, except Rule 4.4, which has been enforced with exceptional vigor in Minnesota.

Perhaps the broadest of these is Rule 4.3, which requires lawyers to make clear to third parties the lawyer's role and any adversity of interests.[Ftn2] The malpractice corollary to Rule 4.3 has been learned by some lawyers in the most painful way: *Togstad* and *Gillespie* should be read by every Minnesota lawyer who thinks clients are hard to come by.[Ftn3] Minnesota has been particularly protective of those who have good reason to think they are clients.

Rules 4.4, 8.4(g) and (h) forbid unduly burdening, harassing, or discriminating against third parties.[Ftn4] Rule 1.6(b)(4) allows lawyers to reveal confidential information, to rectify harm caused a third party by a client who used an unwitting lawyer's services to perpetrate a fraud or crime.

Taken together, these new Rules of Professional Conduct considerably enhance the standing of third parties in lawyer ethics. Moreover, several of these rules have been applied to discipline lawyers in situations where there was otherwise no disciplinary precedent.

Malpractice

The traditional rule was that an action for malpractice required privity of contract and, therefore, a

non-client could not sue an attorney for malpractice. In 1981 Minnesota recognized an exception to the privity rule, allowing a third party to sue if the client retained the attorney for the purpose of benefiting the non-client.[Ftn5] The pivotal question usually is, "Were the lawyer's services intended to benefit the third party?" The context for the question has most often been cases involving drafting or executing a will.

Third parties who are adversaries have not been able to alter history: the attorney owes them no new duties. Certainly adversaries cannot sue counsel for breach of any duty of care. Courts have thought that recognizing such a duty would undermine an attorney's zealously representing the client and equally undermine the client's trust in the attorney.[Ftn6] Even when an ethical duty under the Rules of Professional Conduct may have protection of the third party as an object, that ethical duty is not intended to run to the personal benefit of the adversary, by serving as a basis for a malpractice action.

The Fiduciary Client

The leading authority on attorney malpractice still states without qualification, "In the absence of an express undertaking, fraud or malice, the attorney for a personal representative owes no duty to and cannot be liable for negligence to heirs, legatees [etc]."[Ftn7] However, in many jurisdictions, a "triangular relationship" has come to be recognized, in which the lawyer may have legal duties to those to whom the fiduciary-client is also duty bound.[Ftn8] The attorney for the fiduciary must recognize the possible duties to "beneficiaries" in several ways.[Ftn9] A leading authority puts it this way:

> Since the lawyer is hired to represent the fiduciary, and the fiduciary is legally required to serve the beneficiary, the lawyer should be deemed employed to further that service.[Ftn10]

The first question, as in all duties and conflicts analysis, is, "Who is the client?" Different jurisdictions have answered this question variously. Some have identified the beneficiaries as the client, others the fiduciary entity and others the fiduciary acting as fiduciary.[Ftn11] Minnesota case law appears not to have faced this question frontally - although in the context of a parent suing for an injured child, the court held that the attorney-client relationship existed with the child.[Ftn12] The Lawyers Board has followed what appears to be the majority practice of regarding the fiduciary in the fiduciary capacity as the client.

Client identification is crucial, but does not dispose of all issues. An attorney's duty to communicate with a client, under Rule 1.4, means that the beneficiaries of an estate cannot complain against the personal representative's attorney for failing to communicate with them. However, as third parties, they may file other complaints and they may have malpractice causes of action.

For example, an attorney who informed the beneficiaries that he was the attorney "for the estate," and then acted to further the personal representative's personal interests at the expense of her fiduciary duties violated Rule 4.3. *In re Nelson,* 470 N.W.2d 111 (Minn. 1991). Similarly, an attorney who abetted the conflicting interests of a conservator, by selling her property to the conservatee, for her personal benefit, prejudiced the administration of justice in the probate court. *In re Brown,* 414 N.W.2d 410 (Minn. 1987).

The strongest statement of attorney liability to a "beneficiary" is found in *Fickett v. Sup. Ct. of Pima Cty.*, 558 P.2d 988 (Az. 1976). Attorney Fickett was sued by a successor guardian for negligently failing to discover the thefts of his client, the first guardian. The court upheld the denial of a defense summary judgment motion, stating,

> When an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward . . . The ward's interests overshadow those of the guardian.

Several other recent cases in different jurisdictions have found fiduciary duties running from the attorney for the fiduciary to the beneficiaries such that the beneficiaries may sue the. attorney for breach of fiduciary duty.[Ftn13]

These cases have not explained what the attorney should do when he or she knows that the fiduciary client is misbehaving. The problem of the attorney's confidentiality obligations to a miscreant client has been ignored. The confidentiality rules permit disclosures of client misconduct only in a few specified situations, generally involving the attorney having become involved in the misconduct, perhaps unwittingly - for example, by filing a false guardianship account or eliciting client testimony the attorney later realizes is perjurious.

If these exceptions to the confidentiality rules do not apply to a particular fact situation, such as *Fickett,* then the attorney may feel whipsawed: if the misconduct is revealed, a rule of professional conduct is violated; if it is not revealed, there may be malpractice exposure. Since courts establish both professional rules and liability standards, the solution to this problem must be a judicial one.

One attempt at solution, unfortunately a ham-handed one, was made by the Washington Supreme Court in 1990 when it amended its confidentiality rule:

> A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver or other court appointed fiduciary.

This rule is obviously too broad, for it would permit the criminal defense attorney to reveal a fiduciary client's confidential information about an offense charged against the fiduciary. Moreover, it does not distinguish between different kinds of "breach of fiduciary responsibility," which may range from theft to a failure to diversify investments.

Another issue is whether "fiduciaries" and "beneficiaries" should be regarded monolithically in defining attorney duties. The personal representative and guardian are in many ways different: a decedent's estate often has several beneficiaries who may have conflicts among themselves and with the personal representative, while the guardian has only the ward to serve. The personal representative often has personal interests as well as fiduciary duties, while the guardian typically has only duties. The ward is by definition incompetent and vulnerable, while estate beneficiaries typically have some capacity of self-protection. All of these differences tend to suggest a greater set of duties to the "beneficiary" for the guardian's attorney than for the typical personal representative.

Conclusion

The law of lawyering is coming to recognize that not all third parties are strangers or the advocate's foes. Adversaries are still adversaries, but even they cannot be harassed, unduly burdened, discriminated against or misled about the lawyer's role. Third parties whom the client desires to benefit through the lawyer's services, or to whom the fiduciary client is duty bound, may well have special claims on the lawyer.

The law is a teacher. There is a judicial responsibility to give consistent tests for malpractice and the ethics rules for disclosure; and a lawyer's responsibility to continue legal education. Too many lawyers have learned their new third party lessons in the classrooms of discipline and malpractice liability.

NOTES

1. 2 Trial of Queen Caroline *8, J. Nightingale ed. (1821).*

2. ***Rule 4.3 Dealing with Unrepresented Person***

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall clearly disclose whether the client's interests are adverse to the interests of such person and shall not state or imply that the lawyer is disinterested.

(b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(c) [Omitted]

3. Togstad v. Vesely, et al., *291 N.W.2d 686 (Minn.1980).* Gillespie v. Klun, *406 N.W.2d 547 (Minn. App. 1987). Both cases involved large malpractice liabilities to plaintiffs who successfully claimed to have been clients, but whom the defendant lawyers did not regard as clients.*

4. ***Rule 4.4.*** *In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

Rule 8.4 *It is professional misconduct for a lawyer to :*

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities; or

(h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after conisideration of all circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohitbited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether is was committed in connection with the lawyer's professional activities.

Rule 8.4(g) and (h) also apply to clients. Rule 8.4(h) was adopted by the Minnesota Supreme Court on April 14, 1992.

5. Marker v. Greenberg, *313 N.W.2d 4 (Minn. 1981).*

6. L & H Airco, Inc. v. Rapistan Corp., *446 N.W.2d 372, 379 (Minn. 1989).*

7. Mallen and Smith, Legal Malpractice, 618 (1989).

8. Hazard, *"Triangular Lawyer Relationsihips,"* 1 Geo. J. Leg. Eth. (1987).

9. "Fiduciary" is used here to include trustees, guardians, conservators, personal representatives and the like. "Beneficiaries" is used broadly to identify those to whom the fiduciaries owe duties.

10. Hazard & Hodes, The Law of Lawyering: A Handbook of the Model Rules of Professional Conduct §1.3:108, *at 78(2d ed. 1990). The cogency of this statement may be questioned. For example, when the lawyer is retained to defend a suit by a beneficiary against the fiduciary, the lawyer is not serving the beneficiary.*

11. The number of cases involved is too large for citation here. For a good discussion of the issue, see *Link, "Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: the Effect of the Model Rules of Professional Conduct,"* 26 R. Prop. Prob. and Tr. J. *1 (1991).*

12. Cook v. Connolly, *366 N.W.2d 287, 290 (Minn. 1985). The comments to Rules 1.2 and 1.14, Minn. R. Prof. Con. are also suggestive: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary." (R.12) "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interests, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." (R. 1.14).*

13. See e.g., Weingarten v. Warren, *753 F.Supp 491 (S.D.N.Y. 1990);* Elam v. Hyatt Legal Serv., *541 N.E.2d 616 (Ohio 1989).*