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WHOSE DUTIES AND LIABILITIES TO THIRD PARTIES?

LESLIE GRIFFIN*

"If a used car dealer should not get away with a particular maneuver or omission, why should a lawyer be able to do so?"¹ Professor Geoffrey Hazard poses this question as a "crude"² formulation of the point that lawyers' duties and liabilities should be assimilated to the law of agency. "Assimilating lawyers to other agents reduces the risk that lawyers will be given a place that is either preferred in the law governing liability of professionals or one that is disadvantaged."³ I think that lawyers should be neither "preferred" nor "disadvantaged" in the law of lawyering. Professional ethical standards should not be unique to attorneys. Lawyers who set one legal and moral standard for non-lawyers' duties and liabilities to third parties, while they establish a different standard for themselves, may find the distinction difficult to explain and justify to non-lawyers. I prefer that lawyers be governed by rules that apply to everyone else.

It is not clear from this Symposium if the current law of lawyers' duties and liabilities to third parties is an advantage or a disadvantage—if it overprotects lawyers at the expense of third parties or third parties at the expense of lawyers. The law itself is not clear; the papers demonstrate that the law of third party liability is fluctuating, its rationale uncertain. Traditional norms are eroding, while some new cases offer surprising standards. What the essays do suggest is that to date, lawyers have operated under their own set of standards, but that lawyer-specific rules have begun to erode. The unanswered question is whether the ultimate law of attorney liability to third parties will assimilate the law of lawyers to the law of other professionals or the law of other agents. If such an assimilation occurs, then perhaps third

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1. Geoffrey C. Hazard, Jr., *The Privy Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 970 (1996).

2. Hazard, *supra* note 1, at 970.

3. *Id.*

parties will be neither preferred nor disadvantaged in their lawsuits against lawyers.

Although the authors disagree on whether the old law of third party liability should be retained, they agree on one point: the old standard for lawyers' liability to third parties was the rule of privity. Thus, persons who were not in privity with lawyers could not sue lawyers for malpractice. Privity at one time provided limits on general tort liability. However, in summarizing contemporary developments in tort law, Professor Hazard states: "The notion of 'privity' has lost its place as a limitation on liability in practically all spheres of tort liability except that of lawyer malpractice."⁴ Privity's era has passed in torts. Professor Bauman describes its passing in the sphere of products liability, where the concern for injured third parties, bystanders not in privity with manufacturers or retailers, led courts to abandon traditional rules.

The abandonment of privity in products led to expanded liability, with increased access to compensation for injured third parties. Yet privity remains as a bar to legal malpractice suits. Thus, legal malpractice is an anomaly in the law of torts. Tort law has expanded liability to third parties, although, as Professor Bauman notes, when third parties injured by lawyers have turned to "tort law for relief . . . [it has] turned them away empty-handed."⁵ The result is that "the courts have imposed duties at odds with the standards of other professions."⁶ As long as privity is the rule for all cases, lawyers are neither preferred nor disadvantaged. But retaining the traditional rule of privity when it has disappeared from tort law appears to benefit lawyers over other defendants. Whether the reform of attorney liability law removes this benefit from lawyers, or tort reform limits other defendants' liability, the liability standards should be made equivalent.

Why do we have such an anomaly in the law of torts? Alternative explanations are provided in this Symposium. For convenience, I have labelled them the cynical, professional, moral and legal explanations. The categories overlap, and their value in explaining the anomaly is uneven. Given this disagreement over the rationale for the

4. Hazard, *supra* note 1, at 967.

5. John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 996 (1996).

6. Bauman, *supra* note 5, at 1031 (citing *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (imposing a duty to warn on mental health professionals)). See also Jeffrey P. Kerrane, *Will Tarasoff Liability Be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 825, 827-30 (1995) (discussing the limits of privileged communications in the context of the attorney-client relationship as a result of *Tarasoff* and California Evidence Code Section 956.5).

privity exception, it is not surprising that the authors have not agreed about what the future law of attorney liability should be.

One option is to provide a *cynical* description of the law of lawyers' liability. On a cynical reading, lawyers use the law to protect themselves and their fellow lawyers. Thus, lawyers retain the privity defense to protect themselves against suit. As Professor Bauman points out: "Some commentators have noted, not without amusement, that privity limitations persisted in the field of legal malpractice even as the courts lifted them in other areas. The obvious explanation is self-interest—the profession that controls the courts also controls the content of the common law rules."⁷

Professor Bauman (along with the other authors) also presents a more positive reading of these lawyer-specific rules as *professional* requirements. Under this more "charitable"⁸ view, law is a field that requires a special set of regulations, including the privity rule. For example, lawyers have responsibilities of confidentiality and loyalty to clients. The lawyer's special task—to represent the client zealously—requires privity. The limitless tort liability that would arise if third parties could sue lawyers would interfere with the attorney-client relationship. Lawyers have understood that their professional relationships could be undermined by the erosion of privity. Judges are lawyers and so remain sympathetic to privity for legal malpractice while they reject it in other lawsuits. Courts would be mistaken to sacrifice the attorney-client relationship in order to protect third parties. Professor Bauman concedes that

[i]t is not likely, given the scorn heaped on privity by courts and commentators in other contexts, that the reason for this survival lies in any perceived virtues in privity itself. If one looks for an explanation, therefore, it probably lies elsewhere. [Specifically, a]t least part of the explanation lies in the fact that judges actually understand and respect the constraints that the traditions of the profession place on attorneys. Concerns about conflict of interest, rather than a commitment to a regime of freedom of contract, have thus far protected attorneys.⁹

Together, judges and lawyers have good reasons to protect their profession. This "more charitable explanation is that the benefits of privity are simply more apparent when they appear in the field of legal malpractice because judges are more sensitive to the pitfalls that might result from its abolition."¹⁰

7. Bauman, *supra* note 5, at 1004–05.

8. Bauman, *supra* note 5, at 1005.

9. Bauman, *supra* note 5, at 1030.

10. Bauman, *supra* note 5, at 1005.

However, this sensitivity of judges to the legal profession is not necessarily a positive development; it may be due to professional self-interest. Professor Hazard observes the potentially negative aspects of judicial awareness of lawyers' interests:

The underlying judicial concern may be anxiety about the very idea that lawyers might be subjected to tort liability for incompetence. However, concern about subjecting lawyers to tort claims, if that is the explanation for judicial hesitancy to impose liability, reflects empathy from the bench that has no place in the disinterested administration of justice.¹¹

Thus, the *professional* view—that lawyers have a unique professional role—may encourage the *cynical* view—that lawyers protect their own profession.

Professor Hazard identifies an additional *moral* reason for malpractice law to be anomalous in the law of torts. He claims the practice of law “often involves measures that conflict with widely held conventional moral precepts,” because its “partisanship . . . is repugnant to commonly shared concepts of social equality.”¹² A jury would judge the lawyer by the standards of conventional morality instead of the specific morality of the profession. Lawyers must protect themselves from jurors' judgments about attorneys' violations of conventional moral precepts.¹³ Privity keeps malpractice cases away from the conventional moral judgment of the jury and so protects the special needs of the legal profession. This argument is not persuasive, of course, if one thinks, as I do, that principles of common morality are adequate to guide the legal profession and other professions.

Finally, there are other *legal* explanations for the anomaly of attorney malpractice law. Legal malpractice is not the same as products liability. Professor Bauman argues that the erosion of privity is a good idea where private contracting does not work.¹⁴ In the law of products liability, private contracts did not compensate consumers injured by latent defects, so privity was abandoned. Third party liability developed because consumers could not protect themselves from personal injury through contracts. In contrast, legal malpractice is well-suited to the use of contracts because the parties can protect them-

11. Hazard, *supra* note 1, at 986.

12. Hazard, *supra* note 1, at 968.

13. Professor Bauman voices a similar suspicion of juries when he asks: “[S]hould juries do for the legal profession what they have done for the design of products and the handling of insurance claims . . . exercise an ad hoc, ex post facto, standardless review function to determine whether or not the attorney's conduct toward the third party was ‘reasonable’?” Bauman, *supra* note 5, at 997.

14. Bauman, *supra* note 5, at 1003.

selves through private bargaining. Accordingly, Professor Bauman thinks the area of malpractice is better served by contract law than by tort.¹⁵ This does not mean the lawyers are never liable in tort. They, like everyone else, have independent tort duties, but these duties do not require the breach of privity. For Professor Bauman, private contracts as well as standard tort duties are effective legal means of setting a standard of third party liability.

These diverse explanations—whether cynical, professional, moral or legal—may explain why privity survived as long as it did to bar third parties from suing lawyers. However, “modern tort law does not favor turning injured parties away empty handed.”¹⁶ So “the medieval ‘citadel’ of privity”¹⁷ is under siege, as the “lances” of “[t]ort scholars in shining armor . . . are now turned towards one of the few remaining citadels of privity, that surrounding the attorney-client relationship.”¹⁸

The papers demonstrate the citadel is crumbling and not soon to be rebuilt. The rule of privity is now weakened by numerous exceptions. We have seen the rationale for retaining the rule of privity was uncertain, and so it is not surprising that the exceptions to the rule, as well as the proposals for reform of the rule, are confusing. As Mr. Mallen has stated: “Some decisions can be dismissed as aberrational. Other decisions reflect a clear trend.”¹⁹ The law of the erosion of privity is not consistent and coherent but is “still developmental.”²⁰ According to Professor Hazard, these exceptions are “amorphous and therefore unpredictable in their implications,”²¹ and so privity is “unworkable as a legal concept.”²² Moreover, Professor Hazard notes that “[t]he privity rule with exceptions is structurally flawed because it focuses on the wrong end of the transaction, *i.e.*, where the transaction begins with lawyer and client rather than with the nature of the transaction and where it ends in the ensuing consequences.”²³ Traditional tort law focuses both on the liability of the tortfeasor and the injury to the victim. Lawyers will be neither preferred nor disadvantaged when

15. Bauman, *supra* note 5, at 1011.

16. Bauman, *supra* note 5, at 996.

17. Bauman, *supra* note 5, at 1000.

18. *Id.*

19. Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147, 1166 (1996).

20. Mallen, *supra* note 19, at 1166.

21. Hazard, *supra* note 1, at 969.

22. Hazard, *supra* note 1, at 967.

23. Hazard, *supra* note 1, at 969–70.

their liability law does the same. Right now, it begins and ends with the lawyer and the client.

We notice the confusion in the two leading exceptions to privity—negligent misrepresentation and legal representation intended to benefit a third party—that are examined in several of the Symposium's papers. Even where privity endures ("The general liability rule in Texas . . . has been one of privity."²⁴), it does not bar lawsuits for intentional torts such as intentional misrepresentation and fraud.²⁵ Ms. Pansky reminds us that the usual rule remains that lawyers bear *no* negligence liability to third parties, that negligence liability accrues only to those with whom one is in privity.²⁶ Yet attorneys have been found liable for negligent misrepresentations to third parties, including negligent misstatements in opinion letters.²⁷ Mr. Mallen identifies negligent misrepresentation (especially in the area of opinion letters to investors) as "[o]ne of the areas of greatest expansion of the duty of care to nonclients"²⁸ even though some states (including Texas) continue not to impose liability on lawyers for negligent misrepresentation.²⁹

The papers suggest such negligence liability for attorneys is controversial; it threatens expansive liability. Imposing liability for negligent misrepresentation may be expansive, but on the other hand, such liability might be consistent with the liability of other professions. For example, if lawyers are to be neither preferred nor disadvantaged in third party liability, then there may be good reason to set the same standard for lawyers and accountants in the tort of negligent misrepresentation.³⁰ As Professor Bauman suggests: "In this setting, the cause of action operates for attorneys in much the same way it does for accountants—it holds attorneys to a professional standard of care to identifiable nonclients when they vouch for the accuracy of the information or advice they provide."³¹ There are dangers for lawyers *and*

24. Edward A. Carr, *Attorney Opinion Letters: Model Rule 2.3 and the Texas Experience*, 37 S. TEX. L. REV. 1127, 1138 (1996).

25. See generally Hazard, *supra* note 1, at 970–74.

26. Ellen A. Pansky, *Between an Ethical Rock and a Hard Place: Balancing Duties to the Organizational Client and Its Constituents*, 37 S. TEX. L. REV. 1167, 1178 (1996).

27. Pansky, *supra* note 26, at 1183.

28. Mallen, *supra* note 19, at 1157.

29. Carr, *supra* note 24, at 1140–41.

30. Bauman, *supra* note 5, at 1016.

31. Bauman, *supra* note 5, at 1012. Of course, there is also disagreement about the liability of accountants. See *Bily v. Arthur Young & Co.*, 834 P.2d 745, 746–47 (Cal. 1992):

We conclude that an auditor owes no general duty of care regarding the conduct of an audit to persons other than the client. An auditor may, however, be held liable for negligent misrepresentations in an audit report to those persons who act

accountants with such a standard, because "this duty can easily be extended to an unknown extent by adopting the foreseeability standard."³² Yet, I prefer to hold lawyers and accountants to the same expansive standard rather than protecting attorneys from suit while holding accountants liable.

"[N]early all states" (but not Texas)³³ recognize the second important exception to the rule of privity—the duty of attorneys to beneficiaries of wills they negligently draft.³⁴ In will beneficiary cases, Professor Hazard compares the lawyer to another professional—the mechanic. In certain circumstances, both have duties to third parties injured by their work.

It is difficult to see any reason why a lawyer should not be liable in such a situation. A mechanic who left out a critical part in repairing an automobile would be liable for a wreck subsequently resulting, not only to the car's owner but also to a passenger as well. Why is the lawyer's failure in technique any different?³⁵

Here, Professor Hazard argues that will beneficiary cases are not really exceptions to privity, but instead are "an exemplification of a properly formulated rule."³⁶ The properly formulated rule is "that a lawyer should be liable to a person, in addition to the client, on whom the client manifested an intention to confer a benefit and who suffered loss of the intended benefit as the proximate result of the lawyer's negligence."³⁷ Professor Bauman agrees that general legal principles support liability in these cases because the "imposition of a tort duty is justifiable from the standpoint of the goals of tort law, while at the same time doing no great violence to principles of freedom of contract."³⁸

The will beneficiary exception helps to illustrate the conceptual difficulties surrounding attorney liability to third parties. It may be difficult for the layman to understand the proposition that the lawyer

in reliance upon those misrepresentations in a transaction which the auditor intended to influence. . . . Finally, an auditor may also be held liable to reasonably foreseeable third persons for intentional fraud in the preparation and dissemination of an audit report.

Id.

32. Bauman, *supra* note 5, at 1012.

33. Carr, *supra* note 24, at 1141. See, e.g., *Barcelo v. Elliott*, 923 S.W.2d 575, 578 (Tex. 1996).

34. Mallen, *supra* note 19, at 1149. Ohio, Nebraska, New York, and Texas do not.

35. Hazard, *supra* note 1, at 986.

36. Hazard, *supra* note 1, at 987.

37. Hazard, *supra* note 1, at 987.

38. Bauman, *supra* note 5, at 1011.

has a duty to third party beneficiaries when she drafts a will, but not a similar duty to beneficiaries when she probates the will for the estate's personal representative. The distinction lies in the professional relationship of the lawyer to the client—the same justification that has protected lawyers from the erosion of privity. The professional rules emphasize the attorney-client relationship at the expense of the third party. Those rules are then used to establish the legal standard in a way that limits lawyers' liability.

We discover this emphasis on the lawyer-client relationship in several of the papers. For example, Professor Hazard explains that liability is appropriate in the will-drafting cases because

[i]n many situations, giving legal protection to a person who is a nonclient does *not* compete with protecting the interests of the lawyer's client or restrict the freedom of the lawyer to take legitimate initiatives on behalf of a client. On the contrary, according protection to the nonclient against the lawyer's misfeasance or malfeasance is often consistent with, and indeed a fulfillment of, the welfare of the lawyer's client.³⁹

Liability is appropriate when it matches the *client's* interest. The lawyer's ethical duties to the *client* intervene to limit the lawyer's liability to third parties. The professional relationship and the professional rules appear to provide reasons to limit liability in the substantive law. For example, Professor Price reminds us "the ethics opinions and malpractice decisions vary between themselves and among the states—largely because of *variations in the ethical rules* and in the precedents and orientation of the courts."⁴⁰ He would modify the rules and the case law to recognize some duty to beneficiaries. He states, "The rules should be changed to recognize explicitly that the lawyer for a fiduciary does owe some special duties to the beneficiaries of the fiduciary estate."⁴¹ Professor Price would also modify Rule 1.6 to allow disclosures of breaches of trust to beneficiaries or to a court.⁴² Third parties, as well as clients, must be protected.

The impact of the professional rules on attorney liability is also evident in Mr. Carr's analysis of opinion letters. According to the ABA rule, the "Opinion Recipient is *not* the Opinion Giver's client," and "[a]ny broader role for the Opinion Giver *would raise a funda-*

39. Hazard, *supra* note 1, at 986.

40. John R. Price, *Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems*, 37 S. TEX. L. REV. 1063, 1064 (1996) (emphasis added).

41. Price, *supra* note 40, at 1091.

42. Price, *supra* note 40, at 1092.

mental issue . . . under the applicable rules of professional conduct.”⁴³ As Mr. Carr points out, opinion letters implicate both the attorney’s duties of loyalty to the client and the limited duty to a third party. In Texas “[t]he Client-lawyer relationship has the central and dominant role.”⁴⁴ “[T]he Opinion Giver does assume some ethical obligations to the Opinion Recipient”—because other ethical rules require truthfulness or disclosure of threat of substantial bodily harm—yet the lawyer-client relationship dominates.⁴⁵ Tort law has also deferred to the attorney-client relationship, as Professor Bauman points out:

The courts have recognized the danger of placing conflicting duties on attorneys, and so the standards of professional conduct tend to make the courts skeptical of claims alleging that an attorney is liable in tort to nonclients. The imposition of such tort duties could easily disrupt the relationship of lawyer to client, and courts that might otherwise not agree on much else, have tended to agree that important values are protected by the rules that impose and limit these duties on attorneys.⁴⁶

Why should lawyers’ professional rules determine their liability to third parties? We may reconsider the cynical, professional, moral and legal rationales. None of the authors has provided us with good reason to collapse the professional standard into the legal standard. Perhaps it should be substantive law *alone* that provides standards of liability for lawyers. Perhaps lawyers are preferred in the law as long as their own professional rules limit liability. Once these rules are “at odds” with other professions, “the appeal to the legal profession’s own

43. American Bar Association, *Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law*, 47 BUS. LAW. 167, 194-95 (1991) (Commentary at section 7.1), *quoted in* Carr, *supra* note 24, at 1136 n.35 (emphasis added). Texas was careful to note that this ABA Accord “does not create ‘privity’ (or an attorney-client relationship) for liability purposes.” BUSINESS LAW SECTION, STATE BAR OF TEXAS, REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS 40 (June 2, 1992) [hereinafter TEXAS BAR REPORT] (*quoted in* Carr, *supra* note 24, at 1138 n.46). It continues:

under the Texas Rules, the Opinion Giver may give a legal opinion to a third person Opinion Recipient, but *only* with the consent of the Client and only if the interest of the Opinion Recipient and the Opinion Giver’s self interest can, in the Opinion Giver’s judgment, be squared with the primary duty owed by the Opinion Giver to the Client.

Id. at 15-16; *see also* Carr, *supra* note 24, at 1133.

44. TEXAS BAR REPORT, *supra* note 43, at 15-16 (*quoted in* Carr, *supra* note 24, at 1133).

45. TEXAS BAR REPORT, *supra* note 43, at 27, *quoted in* Carr, *supra* note 24, at 1136. The quotation continues: “and particularly assumes an obligation to abide by strict standards of truthfulness in communicating with the Opinion Recipient under Texas Rule 4.01.” *Id.*

46. Bauman, *supra* note 5, at 1006.

standards to fend off third party liability is likely to start to erode.”⁴⁷ The anomaly of privity in legal malpractice is “at odds” with tort law and suggests that substantive tort law should govern lawyers.

Professor Bauman suggests such a substantive law standard when he explains that some new third party liability cases are traditional tort rules that are finally being applied to lawyers.⁴⁸ A tort law without exceptions for lawyers may set a good standard for third party liability. At some point, allowing tort law to govern the liability of lawyers might even help to limit the expansive liability that frightens the bench and the bar. For example, it might be anomalous to expand lawyers’ liability as tort reformers strive to limit products liability.⁴⁹ Assimilating lawyer liability to the law of tort might eventually keep lawyers from being disadvantaged in the law of third party liability. So too, might the law of agency, with its promise of “assimilating lawyers to other agents, such as real estate brokers, sales representatives, investment bankers, and accountants,”⁵⁰ offer a standard that does not prefer lawyers.

Professor Pearce’s paper illustrates how substantive law affects the liability of union lawyers.⁵¹ If my union lawyer mishandles my case, I may not sue. There is no privity as a matter of substantive law. Such immunity protects unions. “Permitting nonclient suits against a union lawyer based on a negligence theory would therefore alter the relationship between union and member by permitting recovery against a union representative under a lower standard.”⁵² Yet, Professor Pearce reminds us that substantive law cannot resolve all the problems of third party liability when he urges us not to view substantive law and legal ethics as separate and unconnected fields.⁵³ Then: Substantive law sets many of the standards for the union lawyer’s liability to third parties; legal ethics is also necessary to the assessment of the obligation of union lawyers.

47. Bauman, *supra* note 5, at 1031.

48. Bauman, *supra* note 5, at 1029.

49. See, e.g., H.R. 956, 104th Cong., 2d Sess. (1996) (vetoed 5-3-96).

50. Hazard, *supra* note 1, at 970.

51. See generally Russell G. Pearce, *The Union Lawyer's Obligations to Union Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095, 1117-19 (1996).

52. Pearce, *supra* note 51, at 1121.

53. Pearce, *supra* note 51, at 117-20.

Perhaps there is some “seamless web”⁵⁴ of substantive law and legal ethics that can provide a standard that neither prefers nor disadvantages lawyers. Such a joint legal and professional rationale for attorney liability to third parties might even give us reason to reject the cynical explanation.

54. Pearce, *supra* note 51, at 1126.

