Erosion of Privity: The Extension of Legal Malpractice Claims to Nonclients

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As attorneys and law firms struggle to survive in today's economy and face an ever-increasing encroachment on legal services from third parties, potentially their biggest challenge is just over the horizon—the growth of legal malpractice claims from third parties who are not clients. The traditional rule that an attorney owes a duty of care only to his or her client was once the bedrock defense available to attorneys in suits brought by third parties in both contract and tort actions. As courts look to provide recovery for the uncompensated third party, an erosion of the privity defense continues to gain ground. For franchise attorneys, the potential of lawsuits from disgruntled parties they do not represent is of growing concern.

This article examines the exposure franchise lawyers and their law firms face from third-party actions and seeks to identify a safe harbor from such actions in today's ever-shifting legal environment.

REQUIRED ELEMENTS

The essential elements for proving a legal malpractice case originate from the same basic elements as a negligence action: (1) duty; (2) a breach of duty; (3) an injury; (4) the breach that was the proximate cause of the injury; and (5) damages suffered by the injured party.[1] Additionally, a legal malpractice action also requires a showing that an attorney's wrongful conduct has deprived a client or third party of something to which he or she would otherwise have been entitled.[2] In the 2009 Alabama case of *Bonner v Lyons Pipes & Cook*, the client (C.O.W., Inc.) and its owner (Bonner) brought a legal malpractice action against the client's attorney and law firm, contending that the attorney failed to renew in a timely manner the client's franchise agreement. The trial court in Alabama entered a judgment in favor of the defendants and the plaintiffs appealed.[3] The Alabama Supreme Court found that even if a renewal notice had been timely, the client had not paid the required renewal fee due at the time of renewal, which was a condition precedent for renewal. The court reasoned: "To prevail in a legal malpractice action, the plaintiff must prove that, but for the attorney's negligence, the legal matter concerning which the attorney is alleged to have been negligent would have been resolved more favorably to the plaintiff."[4] It is notable that the client in the *Bonner* case never made the argument that its attorney breached a duty to inform the client that payment of the renewal fee was a prerequisite to exercise the renewal option. Had the court been able to find a breach of the required duty, the decision in favor of the attorney-defendant may not have been so favorable.

Not only are the elements of a legal malpractice case based upon the elements of a negligence action, but the available defenses in a negligence action are also present in a legal malpractice case.

PRIVITY DEFENSE

Perhaps the most recognized and traditional malpractice defense is that of privity of contract. At common law, an attorney could be held liable for legal malpractice only to those with whom he or she was in privity of contract.[5] Under this common law rule, only an attorney's client could bring a legal malpractice action against the attorney.[6] The root of the privity defense arose from the fact that an attorney should not be liable to third parties for nonforeseeable harm.[7] Courts generally found that there was no privity (no legal relationship) between an attorney and a third-party nonclient, and therefore there could be no recovery by the third party.[8]

This traditional privity defense originated in England's seminal case of *Winterbottom v. Wright.*[9] Fear of the "absurd and outrageous consequences" that would result from a contrary holding and that there would be "no point at which such action [would] stop" led the court to conclude that absent privity of contract there could be no action for negligence.[10]

The traditional English rule carried over into the United States. The U.S. Supreme Court first applied the common law privity requirement to an attorney malpractice suit brought by a nonclient third party in *Savings Bank v. Ward*,[11] in which the court emphatically held that attorneys are not liable to third parties and stated:

> The obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of the general rule, it seems clear that the proposition of the defendant [attorney] must be sustained.[12]

EROSION OF PRIVITY

The privity requirement provided certainty to an advising attorney, putting her or him on notice of foreseeable malpractice claimants and providing clear guidance as to the

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interests such lawyer should be focused on protecting in providing counsel. This privity rule also motivated third parties to retain their own independent counsel. However, in the last century, the "citadel of privity"[13] has been under attack, giving way to the policy goals of providing remedies to victims of legal malpractice, requiring negligent attorneys to bear the cost of their negligence, and deterring future negligence by attorneys.[14]

Indeed, modern decisions in a majority of states point to a continued erosion of the requirement of strict contractual privity in order to bring a legal malpractice action for negligence.[15] This erosion has resulted in a lack of clarity on how far an attorney's liability for negligence will extend. States have developed several tests, as well as variations within those tests, to determine how broad a class of plaintiffs may bring suit for attorney negligence. Generally, four approaches have been utilized in allowing a nonclient third party to sue an attorney for negligence in the absence of privity: the balancing of factors approach, the third-party beneficiary approach, the Restatement (Second) of Torts approach, and the duty negligence analysis approach.[16] Some states also have employed modified versions of the balancing of factors and third-party beneficiary approaches.[17] Each of the four approaches is discussed below.

BALANCING OF FACTORS APPROACH

The first case to recognize liability to a third party for negligence was the will-drafting case of *Biakanja v. Irving*.[18] In that case, the California Supreme Court considered whether a testator's brother, who was to be the sole beneficiary of the testator's will, could bring a negligence action against the notary public (not an attorney) who had prepared the will when the will was denied probate for insufficient attestation, leaving the brother with only one-eighth of the testator's intestate estate.[19] The court assessed whether a duty was owed to the beneficiary by balancing the following factors:

> the 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.[20]

Before determining that the brother had a cause of action against the notary public, the court also noted that "defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred."[21]

Three years later, in *Lucas v. Hamm*, the same court was the first to recognize liability for an attorney's negligence to a third party not in privity of contract.[22] In *Lucas*, the California Supreme Court omitted the factor of moral blame considered in *Biakanja v. Irving*[23] and substituted the factor of whether recognition of liability under the circumstances would impose an undue burden on the legal profession. The court reasoned that the purpose of drafting wills was to provide property to third parties who were plaintiffs in the case, and that damage to these plaintiffs by negligent drafting and subsequent failure of the bequest was clearly foreseeable.[24] Because the damage would not be discovered until the death of the testator (the party in privity), no claims against the negligent drafter would be possible without allowing the third-party intended beneficiary to bring a cause of action, furthering the policy of preventing future harm.[25]

Outside of the estate planning context, the balancing of factors approach was used to determine potential attorney liability to nonclients in *Stewart v. Sbarro*, dealing with the sale of all of a closely held corporation's stock.[26] When the bank holding the mortgage on the corporation's property would not release the sellers from their personal obligation, an additional mortgage on the premises as well as on the purchaser's primary residence was executed as security for the purchasers' performance to pay the original note held by the bank, as agreed in the parties' original contract.[27] At closing, one of the purchasers was not present, and the purchasers' attorney (one of the defendants in the case) took the mortgage for the purpose of obtaining the signature but never returned the executed mortgage to the sellers.[28] The New Jersey court held that, although an attorney is not normally liable to third parties for negligence in the performance of his professional duties, where an attorney assumes an obligation, he may become liable to those persons whom he has or should have reason to believe rely on him.[29] The court then applied the balancing of factors approach used in the *Biakanja v. Irving* case.[30]

CALIFORNIA'S FOCUS

Although California courts have applied the balancing of factors analysis, their decisions seem particularly to emphasize the foreseeability of harm to third parties. For example, in *St. Paul Title Co. v. Meier*,[31] a California appellate court determined that "the foreseeability of harm to the third party as a consequence of professional negligence is not out-weighed by other policy considerations." In that case, the court found that investors could hold an attorney liable for advice given to a client when it was foreseeable that the client would use the advice to solicit potential investors who had not been identified to the attorney.[32]

In *Roberts v. Ball, Hunt, Hart, Brown, & Baerwitz*, plaintiff sued an attorney for his negligent representation about the identity of a company, BBC, as a general partnership, when plaintiff relied on the opinion of the attorney in making loans to BBC.[33] As it turned out, several of the partners plaintiff believed to be general partners were actually limited partners, who could not be liable to plaintiff as to the amount of their loan for more than the amount of their contributions to the partnership. The court applied the balancing of factors test in concluding that the attorney's opinion about the status of the partnership "was rendered for the purpose of influencing plaintiff's conduct" so that harm to the plaintiff was clearly foreseeable.[34]

BLENDED ANALYSIS

In 1994, the Supreme Court of Washington, in *Trask v. Butler*, combined the balancing of factors approach with the third-party beneficiary approach discussed below to determine attorney liability for negligence to a nonparty.[35] Washington's blended analysis requires a finding that the proposed plaintiff was an intended beneficiary of the attorney's advice as a threshold issue. Only if the court determines that there was an intent to benefit the nonclient third-party are the following factors examined: "(1) the foreseeability of the harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury, (4) the policy of preventing future harm, and (5) the extent to which the profession would be unduly burdened by a finding of liability."[36]

THIRD-PARTY BENEFICIARY APPROACH

In *Guy v. Liederbach*, the Pennsylvania Supreme Court considered whether the beneficiary of a will, who also had been named executrix of the estate, could bring a cause of action against the drafting attorney who instructed the plaintiff/beneficiary/executrix to witness the will, thereby inadvertently voiding her entire legacy and her appointment as executrix.[37] The Pennsylvania court adopted a far narrower approach than the California court applied in *Lucas*, deciding to grant standing to a third-party plaintiff only "where the intent to benefit is clear and the promisee . . . is unable to enforce the contract."[38]

The Pennsylvania court left in place the traditional requirement of privity, requiring either "an attorney-client relationship or a specific understanding by the attorney furnishing professional services."[39] But the court found there could be third-party standing to sue a drafting attorney under Restatement (Second) of Contracts § 302. That Restatement section sets forth a two-part test to determine whether one is an intended third-party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties" and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary," or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[40] Applying that doctrine to this case, the court determined that the beneficiary of a will is an intended, rather than an incidental, beneficiary, sufficient to satisfy the first prong of the Restatement test. The court found that in the testator-attorney contract, the attorney promised to draft a will to carry out the promise of a testator's intent to benefit legatees. The court reasoned that the named beneficiaries should therefore be entitled to the benefit of the attorney's promised performance.[41]

The Louisiana Court of Appeal also addressed attorney liability using the third-party beneficiary approach in *Speedee Oil Change No. 2, Inc. v. National Union Fire Insurance Company*, where a corporation sued an attorney's malpractice insurer as a result of the attorney's negligence in a written opinion advising one of the corporation's promoters that a lease option could be exercised up until thirty-one days after termination of the lease.[42] The issue was whether the corporation was an intended third-party beneficiary of the attorney's advice to the promoter. The court found that the attorney in question incorrectly interpreted a simple contract provision, which caused the corporation's loss and, had the attorney not given the mistaken advice, the corporation would not have allowed the lease termination. The corporation therefore was an intended third-party beneficiary with standing to sue.[43]

RESTATEMENT (SECOND) OF TORTS APPROACH

Expansion of third-party liability began to gain further acceptance as courts moved away from a contractual theory of liability to one based upon the Restatement (Second) of Torts. Restatement (Second) of Torts § 552, entitled "Information Negligently Supplied for the Guidance of Others," states:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
   (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
   (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Under the Restatement (Second) approach, individuals may be liable when they supply false information for the guidance of others. In *Moransais v. Heathman*,[44] the Florida court relied on the Restatement (Second) analysis to determine whether a homebuyer who contracted with an engineering corporation could bring an action for professional negligence against the individual engineers who performed the professional services.[45] The contract with the professional engineering corporation was signed by the chief of the civil engineering division and did not include the names of the engineers who actually performed the inspection. Nevertheless, plaintiff homeowners brought actions against the individual engineers for what plaintiffs claimed to be negligent inspection and advice to purchase the home, when the home in fact was plagued by such defects as to render the home uninhabitable.[46] The Florida court followed the Restatement (Second) approach and determined that the individual engineers in question "were responsible for performing professional services to a client of their company whom they reasonably knew or should have known would be injured if they were negligent in the performance of those services."[47]

Similarly, in *First Florida Bank, N.A. v. Max Mitchell &*

Co.,[48] the Florida court stated that "the doctrine of privity has undergone a substantial erosion in Florida."[49] The court observed that Florida courts had adopted at least four different approaches in assessing the privity issue but determined that section 552, Restatement (Second) of Torts, constituted a middle ground between the restrictive strict privity rule and the expansive "reasonably foreseeable" approach.[50] In adopting the Restatement (Second) approach, the court specifically focused on the following explanation contained in comment (h), directed to subsection (2), which reads in part:

> Under this Section, as in the case of the fraudulent misrepresentation (see § 531), it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.[51]

Plaintiffs have been successful under the Restatement (Second) approach principally when they were able to show that the professional in question had a duty to take a neutral stance, as opposed to when his or her duty was to advocate the most advantageous position for his or her client.[52] For example, when accountants provide compilations, they limit their responsibility solely to the actual compilation of the financial statement, making it clear they have not performed an independent audit.[53] Thus, an accountant is neutral, and the financial statement merely reflects the information provided by the client. But an attorney's duty toward a client while writing an opinion letter or a contract based upon arm's-length negotiations is anything but neutral. The opinion letter or arm's-length contract is prepared to meet a client's needs in such a way that it is not intentionally or negligently misleading to a third party.[54]

DUTY NEGLIGENCE ANALYSIS APPROACH

In *Bradford Securities Processing Services, Inc. v. Plaza Bank and Trust*,[55] the U.S. Court of Appeals for the Tenth Circuit addressed whether a third-party pledgee who foreclosed on bonds could sustain a cause of action against the bond attorney for negligence in drafting his bond opinion, specifically for his representations of payment of consideration, legality of the bond issue, and tax-exempt status of the bonds. The court used the doctrine of foreseeability "as it applie[d] to the proximate cause in relation to the orbit of liability of a defendant toward one or more plaintiffs that [were] not parties to the contract which is alleged to have been tortiously breached by the defendant."[56] In the case before it, the court observed that the class of persons who could end up bringing a claim against the attorney for his negligence in drafting was a "potentially large number," and compared the case to the 1931 New York case of *Ultramares Corp. v. Touche*,[57] one of the earliest cases discussing third-party liability.[58] In that case, legendary jurist Justice Benjamin Cardozo, writing for the Court, upheld the requirement of contractual privity with the defendant, a public accountant, determining that he was not liable for negligence to third-party creditors and investors even in cases where the accountant knew his representations would be shown to banks and creditors as representations in financial dealings.[59] That holding was based, at least in part, on the justices' concern of extending liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[60] Despite the concerns expressed in *Bradford Securities* and *Ultramares*, these cases actually opened the door for discussion by future courts about whether attorneys should be treated like other professionals when considering privity in finding a duty owed to nonclients. Thus, in *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, the Colorado Supreme Court found that an attorney may be liable to a third-party nonclient in an action for negligent misrepresentation.[61] The U.S. Court of Appeals for the Sixth Circuit in *Molecular Technology Corp. v. Valentine*, applying Michigan law, held that an attorney owes a duty to third parties the attorney knew would rely or should reasonably foresee would rely on information provided by the attorney.[62] The U.S. District Court for the Northern District of Georgia in *Horizon Financial, F.A. v. Hansen*, applying Pennsylvania law, held that an attorney's opinion letter could support a claim by third parties for negligent misrepresentation.[63] The New Jersey Supreme Court in *Petrillo v. Bachenberg* found that an attorney's duty may run to third parties who foreseeably rely on an attorney's opinion or other legal services.[64]

FOUR APPROACHES COMPARED

When comparing the four primary approaches to determine an attorney's potential liability to third parties in the franchise context, it is important to remember that most of the early case law and theories of liability arose prior to the emergence of franchising laws and regulations at the federal and state levels. The concept of franchising standing on its own did not really emerge until the California Franchise Investment Law in 1971[65] and the Federal Trade Commission's Franchise Rule, October 21, 1979.[66] As a result, most of the legal theories addressing attorney liability to third parties are derived from contractual or tort principles, which sometimes appear to be manipulated by courts in order to make them applicable to franchising. The first two approaches reviewed above (balancing of factors approach and third-party beneficiary approach) are based upon contract law and seek to find some measure of privity before liability can be found. The last two approaches (Restatement (Second) of Torts approach and duty negligence analysis approach) are based upon tort principles and look first at whether a duty exists before liability can be fixed.

Under the balancing of factors approach, the common approach of the decisions discussed above appears to first assess the connection between the attorney's conduct and the third party's alleged injury and then determine whether that injury was foreseeable. Obviously, the element of foreseeability is factually driven and the amount of factual certainty required to find foreseeability can vary from court to court. All of the cases reviewed, however, appear to have found that there was such a close connection between the injury and the attorney's conduct that the damage was foreseeable.

Cases decided using the third-party beneficiary approach might appear, conceptually at least, to retain the traditional requirement of contractual privity, but in fact the courts have crafted a modified strict privity rule that finds an attorney-client relationship where the third party was the intended beneficiary of the attorney's services. Thus, under this approach, the starting point is whether the injured plaintiff was an intended beneficiary of the attorney's services. If the question is answered in the affirmative, then the court assesses the attorney's performance in order to determine culpability and possible liability.

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The third approach is based upon section 552 of the Restatement (Second) of Torts, entitled "Information Negligently Supplied for the Guidance of Others." Under the Restatement (Second) of Torts approach, the finding of privity is not at issue; rather, courts look to whether the attorney owes an independent duty to the plaintiff. The basis for liability is premised on the lawyer's "knowledge (or acquiescence) that his or her work product will reasonably be relied upon by a third party in making a business decision."[67] As mentioned above, this approach appears to be a compromise between traditional strict privity and reasonable foreseeability.[68]

The fourth and final approach is the duty negligence analysis. This approach assesses foreseeability to determine whether there is a duty owed to a third party as opposed to the balancing of factors approach, which uses foreseeability to analyze the harm suffered by the third party. Under the duty negligence analysis approach, an attorney owes a duty to a third party when he or she knew or should reasonably have foreseen the party would rely on the attorney's information or services that were negligently performed. Thus, there is a duty found (through foreseeability), a breach of that duty, an injury, proximate cause, and damages suffered.

THIRD-PARTY LIABILITY HITS FRANCHISING

Although almost all of the early cases that began to move away from the traditional strict privity rule have been nonfranchise cases, more recently, courts have begun applying to attorney liability in franchising the same logic that was used to find attorney malpractice in estate planning and securities cases.

In *Courtney v. Waring*, the court found that the defendant attorneys could be liable to plaintiff franchisees for legal malpractice because the attorneys knew, or should have known, their legal advice would foreseeably be transmitted to and relied upon by the franchisees.[69] The *Courtney* case was based upon alleged misrepresentations contained in a franchise disclosure document that the defendant franchisor's attorneys prepared for prospective franchisees.[70] The court stated in its ruling, "The attorneys knew when the prospectus was prepared that it would be shown to prospective franchisees and that the information contained in it would be used to induce them to purchase franchises. Thus, the attorneys owed a duty of care to those third parties."[71]

Errors and omissions of counsel may be a factor in dealing with franchise registration and disclosure violations. Some attorneys are not aware that franchise laws exist or erroneously advise clients that they do not apply to particular distribution methods. Others may undertake franchise law matters without adequate preparation or without associating counsel with requisite expertise. An example of preparing franchise documents without the requisite expertise occurred in *Beverly Hills Concepts v. Schatz*, in which the Supreme Court of Connecticut found that a junior associate attorney and her law firm were negligent in failing to advise the plaintiff that it was offering business opportunities under the Connecticut act, which required plaintiff to register prior to entering into any agreements.[72] The court held that it could reasonably be found that the junior associate engaged in legal malpractice because, in her position as a junior associate, she failed to seek appropriate supervision under Rule 1.1 of the *Model Rules of Professional Conduct*, which states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[73]

Can the logic applied to the *Beverly Hills* case be extended so that future courts will look at the Model Rules of Professional Conduct and other state disciplinary rules to set a minimum standard of care for the franchise lawyer? An interesting article written by Howard Bundy for *The Franchise Lawyer* suggests that although a violation of the Model Rules of Professional Conduct may not by itself be a basis for liability, it may create a baseline for the standard of care that, if violated, can lead to liability.[74] Bundy states in the article that "violation of that standard of care can lead to liability if it causes damage to a third party—even if that third party is not the lawyer's client."[75]

The recent Colorado case of *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.* is another illustration of the continuing growth of claims by nonclients against franchise lawyers.[76] In the *Colorado Coffee Bean* case, franchisees sued their franchisor, franchisor's law firm, and the franchisor's parent company for fraudulent nondisclosure, negligent misrepresentation, and violation of the Colorado Consumer Protection Act.[77] The franchisees contended that the franchisor's Uniform Franchise Offering Circular (UFOC) should have disclosed that some of the company's stores had suffered significant losses each year and that exculpatory clauses in the UFOC and franchise agreement did not preclude franchisees from reasonably relying on the nondisclosure of those losses.[78]

The Colorado Court of Appeals vacated the trial court's judgment dismissing the franchisees' fraudulent nondisclosure claim against the parent and subsidiary (franchisor), concluding that the trial court erred in holding that the integration and nonreliance clauses (exculpatory clauses) precluded the franchisees' reliance on nondisclosure of those losses. The court further vacated the trial court's dismissal of the fraudulent nondisclosure and aiding and abetting fraudulent nondisclosure claims against the law firm. The case was thereafter remanded to the trial court for further determination on the fraudulent nondisclosure claims.[79]

Although litigation against franchise attorneys by nonclient third parties is increasing, reported cases are still few. Attorneys therefore lack guidance as to what guidepost will provide a safe harbor. As a result, attorneys must be ever vigilant in protecting themselves from claims filed by third-party nonclients.

CONCLUSION

Without established parameters of a franchise attorney's duty to third parties, attorneys are faced with an unknown, and perhaps currently unknowable, risk of exposure to potential liability from third-party claims. Is there a safe harbor from third-party liability for franchise attorneys? Unfortunately, no bright-line test has yet emerged. Although the four approaches discussed above provide some guidance, there still is no consensus on the type and extent of duty that a franchise attorney owes a nonclient third party. Perhaps franchise attorneys should follow the guidance of fellow accountants by adopting protective and defensive measures such as, among other things, disclaimers and identification of persons entitled to rely on their work. Another approach might be to establish a new set of rules to govern the liability of attorneys to third parties under predetermined conditions of fraud, collusion, or malice. This conduct would certainly be more blameworthy than "mere" negligence and, without question, should not go unsanctioned. Using such an approach, states could place the governed conduct before state legislatures in perhaps the same manner as the Restatement (Second) of Torts was adopted by each state. Undeniably, there is no clear-cut path to eliminate the risk of exposure of franchise attorneys to third-party actions and without some affirmative guidelines, both experienced and inexperienced attorneys practicing franchise law will continue to face the ever turbulent waters of third-party liability.

ENDNOTES

1. Mosley v. Lewis & Barckin, 533 So. 2d 513, 515 (Ala. 1988). *See also* Hall v. Sullivan, 272 F. App'x 284 (4th Cir. 2008), in which the court held that, under Maryland law, a plaintiff's legal malpractice case had to establish that the plaintiff sustained a loss proximately caused by the attorney's breach of a reasonable duty.

2. 7A C.J.S. *Attorney and Client* 3255 at 462 (1980).

3. Bonner v. Lyons, Pipes & Cook, P.C., 26 So. 3d 1115 (Ala. 2009).

4. *Id.*

5. Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. Chi L. Rev. 1535, 1534 (1992).

6. *See* Ronald E. Mallen & Jeffery M. Smith, Legal Malpractice § 7.1, at 360 (3d ed. 1989).

7. *Id.* § 7.4, at 365.

8. For cases denying a third party the right to sue and upholding the strict privity rule, see the following cases: Williams v. Bryan, Cave, McPheeters, McRoberts, 774 S.W.2d 847 (Mo. Ct. App. 1989); Landrigan v. Nelson, 420 N.W.2d 313 (Neb. 1988); Viscardi v. Lerner, 510 N.Y.S.2d 183 (N.Y. App. Div. 1986); Simon v. Zipperstein, 512 N.E.2d 636 (Ohio 1987); Thomas v. Pryor, 847 S.W.2d 303 (Tex. App. 1992); Dickey v. Jansen, 731 S.W.2d 581 (Tex. App. 1987); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990).

9. 152 Eng. Rep. 402 (Ex. 1842). In *Winterbottom*, an injured mailcoach driver was unable to recover damages from a manufacturer who had contracted with the plaintiff's employer, the owner of the coach, to keep the vehicle in good working condition because there was no privity of contract between the plaintiff and the manufacturer. *Id.* at 403.

10. *Id.* at 405.

11. 100 U.S. 195 (1879). Although this was the first instance in which the U.S. Supreme Court decided a case concerning the scope of an attorney's duty to a nonclient third party, the Arkansas Supreme Court had already addressed this issue and adopted the strict privity rule nearly forty years earlier. Sevier v. Holliday, 2 Ark. 512 (1840).

12. *Sav. Bank*, 100 U.S. at 200. The "circumstances" that would take this case and others out of the rule of no cause of action in the absence of privity would be fraud or collusion by the attorney in the misconduct that injured the third party. *Id* at 203.

13. Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441, 445 (N.Y. 1931).

14. Bell, *supra* note 5, at 1534.

15. *Id.* at 1535.

16. Tona L. McDowell, *Torts, Legal Malpractice: No Privity Required*, 18 Am. J. Trial Advoc. 491, 491–92 (1994).

17. Another approach that has been mentioned is based on the Restatement (Third) of Law Governing Lawyers approach. For a brief summary of that approach, see C. Chase Senk, *Another Missed Opportunity in* Shoemaker v. Gindlesberger*: Strict Privity Lives on in Ohio Legal Malpractice Cases*, 43 Akron L. Rev. 291, 300 (2010).

18. 49 Cal. 2d 647, 320 P.2d 16 (Cal. 1958).

19. *Id.* at 18.

20. *Id.* at 650.

21. *Id.*

22. 364 P.2d 685, 688 (Cal. 1961) (en banc).

23. *Id.*

24. *Id.*

25. *Id.*

26. 362 A.2d 581 (N.J. Super. App. Div. 1976).

27. *Id.* at 583–84.

28. *Id.*

29. *Id.* at 589.

30. 320 P.2d 16 (Cal. 1958).

31. 226 Cal. Rptr. 538, 539 (Ct. App. 1986).

32. Bell, *supra* note 5, at 1538.

33. 57 Cal. App. 3d 104, 107 (1976).

34. *Id.* at 111.

35. 872 P.2d 1080 (Wash. 1994) (en banc). *See also* Marianne B. Hill, *Tort Law (Legal Malpractice)—Attorneys May Owe a Duty to Statutory Beneficiaries Regardless of Privity:* Leyba v. Whitley, 26 N.M. L. Rev. 642, 647 (1996).

36. Hill, *supra* note 35, at 647.

37. 459 A.2d 744 (Pa. 1983).

38. *Id.* at 746.

39. *Id.* at 750.

40. *Id.* at 751 (citing Restatement (Second) of Contracts § 302 (1979)).

41. *Id.* at 751–52.

42. 444 So. 2d 1304 (La. Ct. App. 1984).

43. *Id.* at 1308.

44. 744 So. 2d 973 (Fla. 1999).

45. *Id.*

46. *Id.* at 974–75.

47. *Id.* at 979.

48. 558 So. 2d 9, 15 (Fla. 1990).

49. *Id.* at 13.

50. *Id*. at 14.

51. *Id*. at 15.

52. Robert L. Paddock, *Torts-Negligent Misrepresentation-Liability of Attorneys to Third Parties Through Opinion Letters—A Well Intentioned Rule Which May Stifle the Legal Profession if Not Modified*—Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A., *892 P.2d 230 (Colo. 1995)*, 38 S. Tex. L. Rev. 325, 337 (1997).

53. Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third Party Liability of Accountants and Attorneys for Negligent Misrepresentations*, 52 Ohio St. L.J. 1309, 1312–13 (1991).

54. *See* OnitaPac. Corp. v. Trustees of Bronson, 843 P.2d 890, 897 (Or. 1992).

55. 653 P.2d 188 (Okla. 1982).

56. *Id.* at 190.

57. *Id. See also* Ultramares Corp. v. Touche, 174 N.E. 441 (1931).

58. *Bradford Sec. Processing Servs.*, 653 P.2d at 191; Bernard Schwartz, A History of the Supreme Court 229 (Oxford Univ. Press, 1993).

59. *See* McDowell, *supra* note 16, at 491.

60. *Id.*

61. 892 P.2d 230 (Colo. 1995).

62. 925 F.2d 910, 915–16 (6th Cir. 1991).

63. 791 F. Supp. 1561, 1573–74 (N.D. Ga. 1992).

64. 139 N.J. 472, 655 A.2d 1354 (N.J. 1995).

65. Cal. Corp. Code § 3100 et seq.

66. 16 C.F.R. pt. 436.

67. Howard E. Bundy, *Are Franchise Lawyers Liable to Their Clients' Franchisees for Negligent Misrepresentation?*, 12 Franchise Law. 3 (Summer 2009).

68. *Id* at 50.

69. 237 Cal. Rptr. 233 (Ct. App. 1987).

70. *Id.*

71. *Id.*

72. 717 A.2d 724 (1998).

73. Model Rules of Prof'l Conduct R. 3.12 (Discussion Draft 1983).

74. Bundy, *supra* note 67, at 3. *See also* a contra position stated in the article written by Arthur L. Pressman and Gregg A. Rubenstein, *Lawyers Who Prepare FDDs Do Not Take on Potential Liability to Franchise Buyers, Absent Complicity in a Knowingly False Statement*, 12 Franchise Law. 4 (Fall 2009).

75. Bundy, *supra* note 67, at 3.

76. 2010 WL 547633 (Colo. Ct. App. 2010)

77. *Id.*

78. *Id.*

79. *Id.*