

# Expanding the Plaintiff Pool

## Some nonclients are succeeding in malpractice claims against lawyers

BY H. ROBERT FIEBACH

When lawyers think of legal malpractice, they typically envision a claim by a former client alleging negligent representation.

But now, a growing number of malpractice claims against lawyers are being filed by parties who were not clients, at least in the usual sense.

Perhaps the most extreme example of efforts to expand the scope of lawyers' duty of care is a claim by a party against a lawyer who had represented the party's adversary.

So far, the courts have ruled such claims to be as farfetched as they sound. No duty of care has been found in such cases, although opposing parties may pursue claims under rules or statutes providing for sanctions. In addition, parties may pursue actions against counsel for fraud or other intentional misconduct.

In some other areas, however, nonclients have been more successful in pursuing malpractice claims against lawyers.

In the estate and trust field, for instance, lawyers increasingly are being held liable to intended beneficiaries of trusts and wills when their negligence causes bequests to fail. In such cases, most lawyers think of the testators or creators of trusts as their clients.

Some nonclient plaintiffs have gone even further by seeking to hold lawyers responsible where alleged intended bequests fail because instruments were not executed before grantors or testators died.

The potential for creating divided loyalties in a lawyer and the encouragement of claims that cannot be clearly rebuffed in the absence of testimony by a testator or grantor are so obvious that most courts have nipped this type of claim in the bud. Some jurisdictions, however, have permitted such claims to go forward to a de-

termination by a trier of fact as to whether the testator intended to make the bequest, which failed due to the lawyer's delay in getting the document executed.

An estate and trust lawyer may have an even more difficult time in determining who the client



is after the testator-client dies and an estate is raised. When the lawyer is engaged by the fiduciaries, the question has arisen in recent litigation as to whether the client is the estate, the fiduciaries or the beneficiaries and fiduciaries.

Again, while most jurisdictions exonerate lawyers from liability to anyone other than the fiduciaries as the clients, a few jurisdictions have exposed lawyers to liability by beneficiaries.

### Informal Opinions Can Hurt

On another front, the standard malpractice prevention courses now instruct lawyers to avoid giving advice at cocktail parties, the gym or other social settings.

Many lawyers would argue that the kind of informal and general comments offered in such circumstances are only "curbstone" opinions that clearly should not be relied on. However, it is equally clear that many recipients of this kind of advice do not understand those distinctions and believe they have received advice from a lawyer on which they can rely. In some cases, courts have agreed.

Closely related to the growing

danger of curbstone opinions is the situation in which a lawyer voluntarily undertakes to do something for one not otherwise a client.

In a real estate closing, for example, a lawyer representing the buyer might agree to record the purchase-money mortgage for the seller as long as the lawyer is in the courthouse anyway to record the deed.

If the lawyer sticks the mortgage to be filed in a briefcase and then forgets all about it when filing the deed, the lawyer undoubtedly will be held liable if a loss occurs by reason of the failure to file the mortgage.

And this result will obtain notwithstanding the lawyer's protests that

he or she was only doing someone a favor, and that there was no attorney-client relationship.

A number of decisions have held lawyers liable to third parties who have relied on their opinions in situations in which that reliance is reasonable.

Thus, where counsel for a borrower gives the lender an opinion that the conditions of the loan have been met, the lawyer will be held responsible to the lender for that opinion.

In the 1980s, a number of court decisions held lawyers liable to investors in private as well as public syndications when the lawyers had opined, for example, on the tax consequences of transactions to their promoter-clients, who then published the opinions to prospective investors.

In this changing climate, it should be comforting to know that the standard professional liability insurance policies for lawyers do not limit coverage to claims by clients, and that most policies would provide defense and coverage for claims by nonclients as long as the claims arise out of the rendering of professional services. ■

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