I. Privity


1. Strict Privity

“As this court has recognized, ‘the attorney client relationship is distinctly a fiduciary relationship arising as a matter of law and founded upon a special trust and confidence.’ In light of this relationship, an attorney’s obligation is generally to his or her client and not to a third party… (‘an attorney may be liable for legal malpractice only if the plaintiff has proven existence of an attorney-client relationship.’) (emphasis added).

Accordingly, we have concluded that ‘where non-clients are concerned, an attorney’s liability is generally limited to a narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.’ Id. at 877.

2. Policy Reasons Justifying Limitations on Attorney Liability

“First, limiting an attorney’s liability to his or her clients protects the attorney’s duty of loyalty to and effective advocacy for the client (citations omitted).

‘While testator/client is alive, the lawyer owes him or her a ‘duty of complete and undivided loyalty.’ The strict privity rule protects an attorney’s obligation to direct his or her full attention to the needs of the
A client. An attorney’s preoccupation or concern with potential negligence claims by third parties might result in a diminution in the quality of legal services received by the client as the attorney might weigh the client’s interests against the attorney’s fear of liability to a third party. Lewis v. Star Bank, N.A., 90 Ohio App.3d 709, 630 N.E.2d 418, 421 (1993).

Such a result, in turn, would tend to undermine the purpose of the attorney-client relationship, which requires that an attorney act in his or her client’s best interest.

Second, expanding attorney liability to non-clients could result in adversarial relationships between an attorney and third parties and thus give rise to conflicting duties on the part of the attorney.

Third, if an attorney’s duty of care were extended to third parties, then the attorney could be liable to an unforeseeable and unlimited number of people… Thus, as the Supreme Court stated in Ward, 100 U.S. at 202, requiring strict privity ‘is plainly necessary to restrain the remedy from being pushed to an impracticable extreme.’ … (‘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.’)

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Finally, extending attorney liability to non-client beneficiaries risks suits by disappointed beneficiaries that would cast double on the testator’s intentions long after the testator is deceased and unavailable to speak for himself or herself… such a result would be contrary to the ‘cardinal rule in the interpretation of wills or other testamentary documents’, namely, that ‘the testator’s intent should be ascertained from the instrument itself and given effect.’ …”

Baker v. Wood, Ris & Hames, Professional Corporation, 364 P.3d 872, 866-877 (2016) [internal citations omitted].

3. Exceptions to the Privity Rule:
   a. Fraud
   b. Fraudulent concealment
   c. Negligent misrepresentation
   d. Malicious or tortious act
   e. Torts independent of attorney-client relationship

Affirms *Baker*, supra, and rejects exception for third-party beneficiary, breach of contract claims:

“A third-party beneficiary to a contract may generally sue to enforce its terms.

But third-party beneficiary claims against attorneys are treated differently... The attorney-client relationship is a fiduciary relationship in which ‘an attorney’s obligations generally to his or her client and not to a third party.’ For that reason, we adhere to the ‘strict privity rule’, which precludes attorney liability to non-clients absent fraud, malicious conduct, or negligent misrepresentation... this rule ‘protects the sanctity of and duties of protections inherent in the attorney-client relationship.’... it also ‘strikes the appropriate balance between [client’s interests], on the one hand, and non-clients claiming to be injured by an attorney’s conduct, on the other.’”

*Bewley v. Semler*, 432 P.3d 582, 587 (Colo. 2018) [internal citations omitted].

*Bewley* is significant because it affirms *Baker* and clarifies that the Strict Privity Rule extends beyond the estate planning context.

C. **End Run Strategies:**

i. Aiding and abetting breach of fiduciary duty

ii. Civil conspiracy

iii. Civil theft

iv. Conversion

v. Colorado Organized Crime Control Act

vi. Extreme and outrageous conduct

vii. Abuse of process
II. Privacy

A. Policy and History of the Attorney-Client Relationship

B. The Attorney-Client Privilege, C.R.S. § 13-90-107(1)(b)

“An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.”

C. Colo. RPC 1.6: Client Confidences:

Rule 1.6 requires an attorney to maintain the confidentiality of all “information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation,” or one of several exceptions applies. Like the attorney-client privilege, the duty of confidentiality survives the death of the client. See Colo. RPC 1.6 cmt. 20; Colo. RPC 1.9(c); see also, In the Matter of Estate of Lewis Rabin, 2018COA183, (December 27, 2018).

Colo. RPC 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or

(8) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

D. Colo. RPC 1.14: Client with Diminished Capacity:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment 3: [3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf (emphasis added).

See also, Ethics Opinions 126 and 131.

See also, Client with Diminished Capacity and Ethics in Attorney-Client Relationships, M. Carl Glatstein (January 11, 2018).
E. Ethics Opinion 132: Duties of Confidentiality of Will Drafter upon Death of Testator:

A lawyer’s duty of confidentiality continues after the death of a client. Cf. Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality, and “death of client” not listed); Colo. RPC 1.6, cmt. [20] (duty of confidentiality continues after the client-lawyer relationship has terminated); Colo. RPC 1.9(c)(2) (lawyer may not reveal information related to representation of former client); see also Wesp v. Everson, 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after death of client).

→ Contrast Wesp and Ethics Opinions 132.

F. In the matter of Estate of Lewis Rabin, 2018COA183, December 27, 2018:

A personal representative, however, “succeeds the rights and obligations of the Estate’s decedent, effectively ‘stepping into the shoes’ of the decedent.” Colo. Nat’l Bank of Denver v. Friedman, 846 P.2d 159, 163 (Colo. 1993). In other words, the right to claim the attorney-client privilege passes to the personal representative, who becomes the holder of the privilege. Thus, disclosing the privileged communications to the holder of the privilege does not itself violate the privilege.

G. Beware of Inadvertent Waiver of the Privilege

1. In re Fox v. Alfini, 2018 CO 94 (December 3, 2018):

“…the presence of a third party during an attorney-client communication will ordinarily destroy the attorney-client privilege unless the third party’s presence was reasonably necessary to the consultation or another exception applies. Here, because the record supports the district court’s finding that Fox had not shown that her parents’ presence was reasonable necessary to facilitate the communication with counsel, we perceive no abuse of discretion in that court’s ruling that the recording at issue was not protected by the attorney-client privilege.” Id. at *1, ¶2 (emphasis added).

Justice Samour’s dissenting opinion:

“The district court found that Fox was fully able to communicate, relate her symptoms, and describe her chiropractic adjustment in detail when she met with Leventhal and, therefore, her mental capacity was not so diminished that her parents’ presence was necessary to assist during the consultation. In making this factual determination, the district court considered what are best characterized as the parties’ offer of proof and concluded that
defendants’ proffer was more persuasive that Fox’s. Respectfully, I cannot endorse this approach.” *Id., at dissent* *1, ¶ 49.

2. **Open Questions:**

   a. What is “reasonably necessary”, per Fox?

   b. What is “necessary to assist in the representation,” per RPC 1.14?
      i. Who decides?
      ii. When determined?
      iii. How determined?

   c. Degree of diminished capacity?
      i. What are important factors?

   d. Powers of Attorney (general, limited, springing, etc.)

   e. The importance of the record

   f. Hypotheticals:
      i. Adult child assisting elderly parent.
      ii. Parent assisting unsophisticated child.
      iii. Friend assisting and providing support to friend.
      iv. Spouse supporting attorney or physician being sued for malpractice.
      v. Attorney meeting with couple and their financial planner.

III. **Cyber Security: The New Frontier of Attorney-Client Privacy Issues**

A. Buy cyber liability insurance!

B. Review systems and safeguards