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Attorneys not Required to Have Superhuman Powers?

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As intended third-party beneficiary liability evolves, particularly in the realm of estate planning/probate law, attorneys are understandably concerned about the ever-broadening class of non-clients who can sue them for legal malpractice.

In Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2nd 624 (Mo. 1995), the Missouri Supreme Court held in order to have standing to sue an attorney for legal malpractice, a plaintiff did not have to be a client. Rather, the court applied a balancing test which included foreseeability of harm and the existence of a “specific intent” by the client that the services performed by the attorney should benefit plaintiff. *Id.* at 628-29.

There is caselaw in Illinois and Kansas which stands for the same proposition(s) put forth in Donahue. These cases refer to the underlying basis for such holdings as being based on well-established contract law principles. See Greycas, Inc. v. Proud 826 F.2d 1560 (7th Cir.); Pizel v. Zuspahn, 247 Kan. 54 (Ks. 1990); Johnson v. Wieggers 30 Kan.App.2d 672 (Ks.App. 2002).

A number of interesting questions and issues are triggered by this proposition. It is not an uncommon occurrence that a testator dies and the family members begin fighting amongst themselves over the estate. And, unfortunately, it is not unheard of, that in the midst of this familial turmoil, the estate-planning attorney is brought in – either to be a witness or as a defendant. Uncle Joe who was counting on receiving half the estate’s assets becomes angry when he learns he’s been cut from the will in favor of cousin Bob. Joe cannot believe that the dearly departed could have ever intended such a result. Clearly, the decedent was incompetent when they made such a drastic change to their will. Yes, there is no question that the change was made, but the testator did not know what they were doing. Moreover, given the attorney’s interaction with the decedent and the “special powers of discernment” we know all attorneys possess, the attorney should have been able to determine the decedent lacked testamentary capacity. Uncle Joe has no choice – he must sue the attorney!

Is this a viable cause of action? There are not a lot of cases on this point however, a recent California decision suggests that an attorney does not have a duty to beneficiaries to determine testamentary capacity. In this case, Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., et al., some of the beneficiaries alleged that the attorney should have recognized that the testator lacked testamentary capacity and, consequently, should have “confirm[ed] his client’s capacity, competence, and intentions regarding the client’s property dispositions, and should [have] document[ed] such confirmation.” 109 Cal. App. 4th 1287, 1292 (2003). California has also recognized intended third-party beneficiary liability in limited circumstances. However, in Moore, the court specifically held that an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client. *Id.* at 1298.

The court went on to say that the attorney who is persuaded by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will under a former will or beneficiaries of the new will. *Id.* at 1299.