An Attorney's Duty to Non-Clients*

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I. INTRODUCTION

Anecdotally, it appears that there is a trend in Massachusetts decisions that increase an attorney's potential liability to non-clients. At issue is the development of cutting-edge theories that arguably impose upon an attorney for an entity (like corporations or partnerships) fiduciary duties to constituents of the entity. This article addresses an odd divergence between malpractice and fiduciary duty law determining the set of non-clients to whom an attorney owes a duty, and proposes the adoption of a single test under both theories. Attorneys, after all, should be able to reliably determine to whom they owe a duty to, whether it is a duty of care or a fiduciary duty.

The leading case in Massachusetts expanding an attorney's liability to non-clients is *Cacciola v. Nellhaus*.1 This case illustrates the maxim that bad facts can make bad law. In *Cacciola*, the widow of one of four brothers, who were partners in a real estate investment, sued the partnership's lawyer when she learned that he had surreptitiously represented a second brother in his purchase of the partnership share of a third brother at a substantial discount upon that brother's death. The Superior Court dismissed the case on the grounds that there was never an attorney-client relationship between the plaintiff (or her husband) and the attorney. The Appeals Court upheld the dismissal of the malpractice claim for want of an attorney-client relationship, but inferred a count in the complaint for breach of fiduciary duty (though none was pleaded), reasoning that the defendant attorney may have owed the widow's husband a fiduciary duty arising from his representation of the partnership.2 The problem with *Cacciola* is that the law of negligence and the law of fiduciaries now arguably impose inconsistent obligations upon an attorney to a non-client under the same facts and circumstances. This article analyzes the Appeals Court's decision and proposes a roadmap to

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2. See id. at 750-52 (This case has been settled by the parties).
developing consistent standards in malpractice and fiduciary law.

II. DUTIES ARISING FROM AN EXPRESS ATTORNEY-CLIENT RELATIONSHIP

A. The Ordinary Attorney-Client Relationship

The threshold issue of any legal malpractice lawsuit (i.e. negligence) is whether the attorney owes the plaintiff a duty of care, usually arising from an attorney-client relationship. "It is the general rule that an attorney's liability for malpractice is limited to some duty owed to a client. . . . Where there is no attorney-client relationship, there is no breach or dereliction of duty and therefore no liability." A relationship is easily categorized as a traditional attorney-client relationship if the attorney provides legal services under a written or oral contract in exchange for payment. Other relationships, discussed below, are more difficult to categorize.

B. Representation of Partnerships, Corporations and Other Entities

As a general rule, Massachusetts Courts have been reluctant to extend the attorney-client relationship beyond the attorney's immediate client, even where the attorney represents an entity such as a partnership or corporation. As discussed above, the Appeals Court in Cacciola upheld the trial court's dismissal of the widow's malpractice claim on the ground that an attorney for a partnership does not owe a duty to the individual partners of the partnership arising solely from representation of the partnership. Therefore, an attorney who represents a partnership (or corporation) does not have an attorney-client relationship with the constituents of that entity such as the partners or shareholders.

4. See 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 25.8, at 761 n.1 (5th ed. 2000) and cases cited therein. Moreover, an attorney does not enter into an attorney client relationship with subpartners of one of the partners to the partnership, even if an attorney who represents a partnership also represents the individual partners. "A subpartnership is a partnership formed between a member of a preexisting partnership and a third person for a division of the profits coming to the contracting member from the original partnership enterprise." 59A AM. JUR. 2d Subpartnership §38, 254 (1987). "[S]ubpartners are partners as between themselves" id. at 255, because a "subcontract . . . between one member of a firm and a stranger, does not make the stranger, as between him and the firm, their copartner." Fitch v. Harrington, 13 Gray 468, 474 (Mass. 1859); Lovejoy v. Bailey, 214 Mass. 134, 150 (1913); see Burnet v. Leininger, 285 U.S. 136, 139-41 (1932); Morrison v. Dickey, 50 S.E. 175, 177 (Ga. 1905); Rogers v. M.O. Bitner Co., 738 P.2d 1029, 1036-37 (Utah 1987) (Zimmerman, J., concurring). Thus, a subpartner does not stand in the same place as a partner in relation to an attorney for the original partnership.
partnership does not owe a duty of care directly to general partners or to limited partners.

With respect to corporations, corporate counsel does not owe a duty of care to stockholders, directors, officers, employees, or other representatives of the corporation, even when the attorney represents closely-held corporations. There is no reason to believe that Massachusetts courts would rule differently for entities like professional corporations or limited liability corporations.

C. Representation of Fiduciaries

Similarly, representation of a fiduciary does not give rise to a concurrent attorney-client relationship (or fiduciary relationship) with persons to whom the fiduciary owes a fiduciary duty. Massachusetts courts have recognized that the potential for conflict between the interests of the fiduciary and the persons to whom he owes a fiduciary duty precludes such an expansion of the attorney-client relationship. Nonetheless, the attorney may still be liable if he aids and abets a breach of fiduciary duty.

III. THE DEVAUX TEST - IMPLIED RELATIONSHIPS ARISING FROM CONDUCT

Notwithstanding the absence of an express attorney-client relationship, such a relationship can be established through the parties' conduct. Massachusetts courts recognize that there are situations where a de facto attorney-client relationship arises even in the absence of an explicit agreement. Accordingly, Massachusetts courts have recognized an implied relationship when: "(1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the

5. See 3 M Alle n, supra note 6, at 763.
10. See Spinner, 417 Mass. at 554.
11. See id. at 556-57; see also Kurker, 44 Mass. App. at 190 n.5.
attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” In addition, an "individual's subjective, unspoken belief" that there is an attorney-client relationship is not enough, rather, the belief must be (1) "objectively reasonable under the totality of circumstances" and (2) the attorney must be aware of the belief. Where there is an implied attorney-client relationship, the attorney owes the implied client the same duty of care as if there were an express relationship, because the relationship is the same whether it arises from a contract or from a course of conduct.

Plaintiffs rarely prevail, however, on an implied attorney-client relationship theory. For example, in Sheinkopf v. Stone, where an investor sued an attorney's former law firm claiming that he had been defrauded in connection with investment advice by the attorney, the United States Court of Appeals for the First Circuit concluded that no attorney-client relationship could be implied between the investor and the firm where there was no preexisting attorney-client relationship, no retainer, no agreement for legal services, no legal advice given, and where the client was regularly represented by other counsel. Similarly, in Robertson v. Gaston Snow & Ely Bartlett, where a former corporate officer sued the corporation's attorneys for their role in a reorganization that resulted in the plaintiff's loss of employment, the Supreme Judicial Court of Massachusetts did not recognize an implied relationship even where the plaintiff had subjectively believed that the defendant law firm represented him, asked the firm about his employment, and requested and received a sample employment agreement. The Court reasoned that there was "little basis to imply . . . an attorney-client relationship" because the client never explicitly asked for representation, was never billed, and did not discuss the sample employment agreement with the firm.

14. Sheinkopf, 927 F.2d at 1265.
15. See DeVaux, 444 N.E.2d at 359.
16. See Sheinkopf, 927 F.2d at 1264-68.
17. See Robertson, supra note 9, at 522-23.
18. Id.; see also R.I. DEPCO., 64 F.3d at 27-28 (applying Rhode Island law, the court held that there was no implied relationship between attorney for limited partnership and a limited partner where the limited partner sought separate counsel when transaction went
IV. DUTY OF CARE TO NON-CLIENTS ARISING FROM RELIANCE

Even absent any attorney-client relationship, express or implied under *DeVaux*, an attorney can still be liable for malpractice to a third party under a narrow set of circumstances. According to the "reliance doctrine," an attorney may owe a duty of care to a non-client "who the attorney knows will rely on the services rendered."\(^{19}\) The reliance doctrine, however, has been less readily applied to lawyers than to other service providers, e.g., surveyors and accountants.\(^{20}\)

Recent cases suggest that a non-client must prove that the attorney intended to supply the information for the benefit of the non-client rather than merely that the attorney reasonably should have foreseen the non-client's reliance.\(^{21}\)

If the attorney's duties to his actual client, however, conflict with any duty to the non-client claiming reliance, "the court will not impose a duty of reasonable care."\(^{22}\) The mere potential of a conflict is sufficient to defeat the non-client's malpractice claim.\(^{23}\) Whether a potential conflict exists turns, in part, on whether the attorney's duty of confidentiality to the client conflicts with a duty to the non-client.\(^{24}\) Further, an isolated "identity of interests" between the client and non-client for a specific transaction or legal service is not enough to overcome the rule against imposing conflicting duties to clients and non-clients – there must be an identity of "the entire legal representation."\(^{25}\)

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\(^{19}\) DaRoza v. Arter, 416 Mass. 377, 382 (1993); Robertson, 404 Mass. at 524.


\(^{22}\) Lamare v. Bubanes, 418 Mass. 274 (1994); see also DaRoza, 416 Mass. at 383; Robertson, 404 Mass. at 524.

\(^{23}\) See One National Bank v. Antonellis, 80 F.3d 606, 609 (1st Cir. 1996).

\(^{24}\) Id. at 610-11 (holding that there was no duty to the non-client plaintiff arising from foreseeable reliance because the attorney owed a conflicting duty of confidentiality to the client not to disclose the information at issue to the plaintiff).

V. FIDUCIARY DUTY TO NON-CLIENT CONSTITUENTS OF A CLIENT ENTITY.

Although legal malpractice law (as discussed above) is not a beacon of clarity, it at least provides an attorney with discrete tests to determine to whom he owes a duty of care. This is true even when he represents an entity, because absent unusual circumstances, he owes a duty of care solely to the entity itself and not to its constituents. Accordingly, an attorney could avoid malpractice claims so long as he fulfilled his duty of care to his client corporation or partnership.

This clarity may have changed with *Cacciola v. Nelhaus*. *Cacciola* showed that even though an attorney for an entity could defeat, as a matter of law, malpractice claims brought against him by non-client constituents of the entity, it remains unclear whether he can similarly defeat a breach of fiduciary duty claim that arises from the same facts and circumstances and essentially mimics the malpractice claim (under a different heading). While the duty of care and a fiduciary duty do not impose the same set of obligations upon an attorney in the context of a non-client lawsuit, the threshold issue under either theory is usually whether a duty is owed in the first place.26

The roots of this inconsistency first arose in *Shaeffer v. Cohen, Rosenthal*.27 In *Shaeffer*, where a former fifty-percent shareholder of a closely held corporation sued the corporation's counsel for concurrently representing the corporation and the other shareholder, the Supreme Judicial Court recognized the "logic" of the argument that "even though counsel for a closely held corporation does not by virtue of that relationship alone have an attorney-client relationship with the individual shareholders, counsel nevertheless owes each shareholder a fiduciary duty."28 The Court, however, did not decide the issue, and upheld the trial court's ruling on the ground that, because plaintiff was no longer a shareholder and the action was properly a derivative action, plaintiff lacked standing to bring the action.29 *Cacciola* went one step further and held that an attorney for a partnership *may* owe a fiduciary duty to each of its partners even though there is no attorney-client relationship between the attorney and the individual partners. Accordingly, the *Shaeffer* and *Cacciola* opinions arguably opened the door to the concept that counsel to an entity *may* owe a fiduciary duty to the constituents of the entity even in the absence of an

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26 The duty of care requires an attorney to perform legal services with a reasonable degree of skill, while the fiduciary duty requires an attorney to represent a client with undivided loyalty and to preserve the client's confidences.
28 *Id.* at 1002.
29 *Id.*
attorney-client relationship.

Neither Cacciola nor Schaeffer, however, explain when such a fiduciary
duty arises. The answer may be found in Van Brode Group, Inc. v.
Bowditch & Dewey. This case supports the proposition that the DeVaux
test, which determines the existence of an implied attorney-client
relationship, can also determine whether there is a fiduciary duty under the
same circumstances. In Van Brode, the trial judge instructed the jury on
implied attorney-client relationships under DeVaux, but failed to instruct
the jury separately on a breach of fiduciary duty claim. The Appeals Court
held that the trial court had not erred by omitting a separate fiduciary duty
instruction because the DeVaux instruction had "covered the subject matter
of the fiduciary duty count." The Court reasoned that whether the
defendant attorney owed a duty of care or fiduciary duty to the plaintiff
turned on whether plaintiff ever relied upon defendant attorney.
Accordingly, it held that the trial judge's use of a single instruction was
sufficient to address both theories.

Using the same DeVaux test to determine the scope of an attorney's duty
doing and a fiduciary duty to constituents of an entity makes sense on
several levels of analysis. First, uniform application of the DeVaux test
ensures that an attorney owes a duty of care and a fiduciary duty to the
same set of people, which avoids thorny conflicts of duty issues. For
example, an attorney's obligation to keep certain communications
confidential because of an attorney-client relationship with the entity might
conflict with his duty to disclose those communications to a non-client
shareholder to whom he owes a fiduciary duty. There would be no such
conflict if the attorney was in an attorney-client relationship with the same
people that he owed a fiduciary duty to.

Second, uniform application of the DeVaux test would reflect the logic
that unless an attorney acts in a fiduciary role other than as an attorney (for
example, an escrow agent), his scope of duty, whether under malpractice
law or fiduciary law, should arise directly from the provision of legal
advice and services. After all, what other aspect of an attorney's conduct as
an attorney gives rise to a fiduciary duty? Third, the DeVaux test effectively encompassed any meaningful
definition of a fiduciary duty. In Fassihi v. Sommers, Schwartz, Silver,

31. Id. at 516.
1996), cited in Cacciola, supports this proposition. In this case, the defendant attorney
acted as an escrow agent, and the Supreme Judicial Court held that the defendant attorney,
in his capacity as an escrow agent, owed a fiduciary duty to the parties to the escrow. The
opinion did not impose a fiduciary duty upon the attorneys to non-clients arising from their
provision of legal services or advice. Id.
Schwartz & Tyler, P.C.,\textsuperscript{33} cited by Schaeffer and Cacciola, the Court of Appeals of Michigan reasoned that a fiduciary relationship arose when one reposed "faith, confidence, and trust in another's judgment and advice."\textsuperscript{34} Massachusetts fiduciary law imposes an additional requirement, that the defendant knew that the plaintiff was relying upon him.\textsuperscript{35} The \textit{DeVaux} test incorporates these general rules by asking whether the non-client has sought advice within the expertise of the attorney, whether the attorney has given the sought-after advice, and whether the attorney is aware of the relationship.

The bottom line is that if a breach of fiduciary claim arising from the same facts as a malpractice claim is allowed to survive even when there is no express or implied attorney-client relationship, the breach of fiduciary duty claim threatens to subsume and render the \textit{DeVaux} test meaningless. Common sense dictates that the same test should be used to determine the scope of both an attorney's duty of care as well as fiduciary duties under the same circumstances.

\textbf{VI. CONCLUSION}

Massachusetts courts have established clear tests to determine the scope of an attorney's duty of care to implied and express clients. Cacciola, however, suggests that an entity's attorney may owe a fiduciary duty to its constituents even if the attorney is not in an attorney-client relationship with those constituents and does not owe them a duty of care. But Cacciola does not explain how an attorney determines whom he owes a fiduciary duty to.

This state of inconsistency and uncertainty is patently unfair to attorneys who represent entities because they cannot reliably determine whom they owe duties to. Accordingly, Massachusetts courts should adopt clear standards for an attorney's fiduciary duty to non-clients that are consistent with malpractice law. The \textit{DeVaux} test used to determine implied attorney-client relationships is the choice candidate to also determine the scope of an attorney's fiduciary duty to non-clients. As the Appeals Court reasoned in \textit{Van Brode Group, Inc. v. Bowditch & Dewey},\textsuperscript{36} the \textit{DeVaux} test effectively encompasses the elements required to find a fiduciary duty. With essentially one test to determine whether an attorney owes any duty to a non-client, an attorney can then act accordingly and avoid being ambushed by a non-client lawsuit.

\begin{itemize}
\item \textsuperscript{34} \textit{Id}, at 648.
\item \textsuperscript{35} See, \textit{e.g.}, Patsos v. First Albany Corp., 741 N.E.2d 841, 850-51 (Mass. 2001).
\item \textsuperscript{36} 633 N.E.2d 424 (Mass. App. Ct. 1994).
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