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Attorney's Liability in Non-Client and Foreign Law Situations

John E. Martindale*

THIS ARTICLE WILL EXAMINE the liability of an attorney for an incorrect opinion where the complainant is not the attorney's client. It will also give special consideration to the problem of giving advice on the law of a jurisdiction other than the attorney's own state.

I

An attorney is liable for all damage resulting to his client by reason of improper or erroneous advice where an attorney of reasonable knowledge and professional capacity exercising ordinary care under the circumstances would have avoided the error.¹ The measure of an attorney's performance is thus one of whether or not he observed a reasonable standard of care in giving the advice in question.

Whether this liability proceeds *ex-contractu* or *ex-delicti* is a matter rarely considered by the courts in their opinions. Indeed, many cases merely use language which assumes that the liability exists without analysing its basis.² There is, however, ample authority for the proposition that the attorney's liability may be predicated upon contract.³

The following quotation from *Currey v. Butcher*⁴ is accurate in that it indicates that the action is not so much one for the breach of the contract as for the breach of the duty the contract creates.

Where one adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, the law imposes a duty to exercise reasonable care and skill, and if an injury results to his client from want thereof he is liable to respond in damages to the extent of the injury sustained. This duty

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¹ 7 C. J. S. Attorney and Client, § 143, p. 980. See also 45 A. L. R. 2d 5.

² E.g., *Citizens Loan v. Friedley*, 123 Ind. 143, 23 N. E. 1075 (1890).

³ *Weekley v. Knight*, 116 Fla. 721, 156 S. 625 (1934); *Solomon v. Meyer*, --- Fla. ---, 116 S. 2d 37 (1959); *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P. 2d 685 (1961); *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621 (1879).

⁴ 37 Ore. 380, 61 P. 631 (1900).

and liability arises from the relation of the parties under the contract, rather than from the contract itself, and at common law the injured party could sue, either in *assumpsit*, for a breach of the implied promise, or in case, for the neglect of duty; 3 Enc. Pl & Pr. 107.

The foregoing indicates that the action is either *ex-contractu* or *ex-delicti* for the breach of a duty which exists because of a contractual relationship. Much less consideration has been devoted, however, to the question of whether or not the attorney's liability will sound in tort alone, where no contract is present. This is obviously because most attorney malpractice cases arise between attorney and client in a situation in which a contract of employment is easily available upon which to place liability. The case of *Savings Bank v. Ward*, which will be discussed at length later in this article, is often cited for the proposition that the attorney's liability sounds only in contract. Careful examination of this case, however, does not indicate that it is so limited. The court refers to the early case of *Fish v. Kelley*,⁵ wherein an attorney was sued in negligence by one to whom he had given, in answer to a casual inquiry, erroneous information as to the contents of a deed. Erle, C.J., held that there was no relation between the parties from which any contract could be implied *nor any relation between the parties from which any duty could arise*. It is obvious that the relationship of attorney-client, like the relation between physician and patient, principal and agent, and bailor and bailee, can arise quite without contract. It is equally well established that the creation of these relationships gives rise to certain duties for the breach of which an action for damages will lie. It is therefore generally conceded that an action by a client against his attorney will sound in tort for the breach of the attorney's duty to exercise due care even where there is no contract upon which to base liability.⁶ And it cannot be doubted that the attorney may be liable to a third person where there is in fact a contractual third party beneficiary situation or a tri-partite contract.

The more difficult question is that of the attorney's tort liability when not even the relationship of attorney-client exists. This, in fact, is the central problem in determining an attorney's

⁵ 17 C.B.N.S. 193, as cited in *Savings Bank v. Ward*, n. 3 *supra*.

⁶ *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); 5 Am. Jur., Attorneys at Law, § 47, p. 287; Annotation: Ann. Cas. 1917 B, p. 6; 45 A. L. R. 2d 14.

liability to third persons who are not parties to the attorney's employment contract with his client.

II

In considering the attorney's liability to third persons for misrepresentations or inaccuracies as to the law in his opinion, it must be stated at the outset that if the attorney's conduct meets the requirements for an action of fraud, the existence or non-existence of an attorney-client relation between the parties will be immaterial, and the fact that representations or misrepresentations as to matters of law are not normally actionable on the basis of fraud will be no defense.⁷ The attorney will be liable for the results of his fraudulent conduct. Referring again to the case of *Fish v. Kelley*,⁸ which involved advice given by an attorney in answer to a casually asked question, Erle, C.J. said:

Under the circumstances I do not think the defendant can be held responsible for the representation he made *unless it could be shown that at the time he made it he knew it to be false.* (Emphasis added.)

It is where the misrepresentation as to law or the mistake in advice is merely negligent, that the problem of liability to third parties arises.

At this point it may be well to review some general principles regarding the law of misrepresentation. Prosser states that in general there is no liability to third persons for an attorney's negligent opinion unless a representation is made by the attorney to the third party or with knowledge that it will be communicated to him for the purpose of inducing action.¹⁰ Obviously the exceptions in the above rule, which create liability to third parties, are at issue under the circumstances involved in this article. Our problem here specifically concerns the situation in which the attorney provides information for a third party, not his client, well knowing that that third party intends to rely upon his advice. The true question, as we shall see, is whether or not under the facts of the situation there is a duty relationship between the parties, arising from contract or otherwise, for the breach of which an action in damages will lie.

⁷ *Rosenberg v. Cyrowski*, 227 Mich. 508, 196 N. W. 905 (1924).

⁸ *Supra*, n. 6.

¹⁰ Prosser, *Torts* (2nd Ed.) 543.

The often stated position requiring privity of contract or an attorney-client relationship between the parties in order to create liability on the part of an attorney for his negligence, has for its basis the important case of *Savings Bank v. Ward*, which was decided in the United States Supreme Court in 1879.¹¹ The syllabus in that case adequately sets forth the facts involved.

'A,' an attorney at law employed and paid solely by 'B' to examine and report on the title of the latter to a certain lot of ground, gave over his signature this certificate. "'B's' title to the lot is good and the property is unencumbered." 'C,' with whom 'A' had no contract or communication, relied upon this certificate as true and loaned money to 'B'; upon the latter, executing by way of security therefor a deed of trust for the lot. 'B,' before employing 'A,' had transferred the lot in fee by a duly recorded conveyance, a fact which 'A' on examining the record could have ascertained had he exercised a reasonable degree of care. The money loaned was not paid and 'B' is insolvent. *Held*: (1) That there being neither fraud, collusion, nor falsehood by 'A' nor privity of contract between him and 'C,' he is not liable to the latter for any loss sustained by reason of the certificate. (2) That usage cannot make a contract where none was made by the parties.

In considering this case, an immediate distinction of fact must be made. It was conceded here that the certificate was made by the defendant at the request of the applicant for the loan without any knowledge on the part of the defendant as to the use to be made of the same, or to whom the certificate was to be presented. Even when measured by Prosser's theory as given above, which is a correct statement of the modern law, there would be no cause of action here because the facts created no duty relationship between the plaintiff and defendant. But in deciding this case, the Supreme Court did not confine itself to that reasoning. Drawing heavily upon the law of England, the court stated the general proposition that there is no liability on the part of an attorney in the absence of privity of contract between attorney and client.

In deciding *Savings Bank v. Ward*, the Supreme Court cited a large number of English cases. Typical of these is the case of *Winterbottom v. Wright*¹² in which a driver of a mail coach was injured when the coach broke down as a result of a defect in its

¹¹ *Supra*, n. 3.

¹² 10 Mee & W. 109.

construction. In it Lord Abinger imposed upon negligence actions by consumers against manufacturers the requirement of privity of contract. *Winterbottom v. Wright* is a dead letter in American law and has been ever since Judge Cardozo decided the case of *McPherson v. The Buick Motor Company*.¹³ *McPherson v. Buick* eliminated from the American law of manufacturers' liability both the requirement of privity of contract in negligence actions and all of the exceptions to that rule involving inherently dangerous articles. Instead it substituted the simple question of whether or not there was a duty relationship. Modern cases citing *Savings Bank v. Ward* give it a far more restricted meaning than the language contained in the original case. An example of this may be found in *Stevenson v. East Ohio Gas Company*¹⁴ where *Savings Bank v. Ward* is cited for the proposition that:

. . . as a general rule at least a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.

Cases involving the third party liability of attorneys in facts similar to those under consideration here are rare.¹⁵ Much more common are those involving abstractors of title. In 1899, an Appellate Court in Indiana, in *Brown v. Simms*,¹⁶ held that an abstractor of titles, who, at the request of the owner of lands, furnishes an abstract to a third person knowing that the latter would use it in determining whether the title is safe to make a loan, is liable for loss sustained by the third party on the loan through defects in the title not disclosed by the abstract. However, the language of the court in this case does not make it clear whether the liability imposed springs from contract or from tort. At the conclusion of its opinion, the court seems to follow the early view that the defendant was liable in tort for the breach of a duty which arose as a result of a contract.

¹³ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁴ 47 Ohio Abs. 586, 73 N.E. 2d 200 (1946), quoting from *Robinson Dry Dock v. Flint*, 275 U. S. 303.

¹⁵ Of close collateral interest is the line of cases involving the liability of an attorney to an intended beneficiary when the attorney so negligently draws his client's will as to defeat the right of the intended beneficiary. A complete annotation on this subject, based on both contract and tort theories, may be found at 65 A. L. R. 2d 1363.

¹⁶ 22 Ind. App. 317, 53 N.E. 779 (1899).

A very similar case on facts is the case of *Shine v. Nash Abstract & Investment Company*.¹⁷ Here, however, the abstract of title was ordered from the defendant by a real estate broker who was representing both the purchaser and the seller of land. The court's reasoning again leaves the basis of the liability as between tort and contract unclear:

But we are of opinion that sound reasoning and the weight of modern authority sustain the rule of liability for negligence resulting in injury to the vendee, where the vendor is under duty, or assumes the obligation, to furnish such abstract for the use of the vendee, and the person making the abstract on the vendor's order has knowledge or notice that the abstract is for such use, this on the ground that in such circumstances the engagement of the abstractor by the vendor is a contract made for the benefit of the vendee, and under such engagement the abstractor owes the vendee, who is to use and rely on the abstract, the duty of using reasonable care and skill in examining the records affecting the title and making the abstract.

Probably the first case to set forth the modern view of tort liability in this situation is the case of *Lawall v. Groman*.¹⁸ The defendant was an attorney who had been employed by a borrower to furnish an abstract of title to certain land to a lender, who was the plaintiff in this case. The abstract was of the title of land to be used as a security for the loan. The attorney, in preparing his abstract, overlooked several encumbrances upon the property. In holding that the trial court was in error in granting a non-suit for the defendant, the Supreme Court of Pennsylvania said that the attorney unquestionably acted in some degree for and in behalf of the lender and the court could not say as a matter of law that there was no attorney-client relationship.

The court, however, did not rest its ruling upon the possibility of finding an attorney-client relationship between the plaintiff and defendant, but went on to say:

If . . . defendant knowing that plaintiff was relying on him in his professional capacity to see that her mortgage was the first lien, although Roberts was to pay the fees, undertook to perform that duty, he was bound to do it with ordinary and reasonable skill and care in his profession, and would be liable for negligence in that respect.

¹⁷ 217 Ala. 498, 117 S. 47 (1928).

¹⁸ *Supra*, n. 6.

Lawall v. Groman was cited and approved by Justice Cardozo when he decided the case of *Glanzer v. Shepard*.¹⁹ There the defendant was a public weigher and the plaintiff was a buyer of goods. The defendant had been ordered by a seller of goods to weigh them and was paid for this service by the seller. The weigher, however, knew that his certificate of weight would be furnished to this particular buyer and would be a material factor in inducing the purchase. In recognizing the liability of the weigher for negligence in the performance of his duty, Justice Cardozo said that the duty was not exclusively contractual, but was imposed by law because of the contract and the relationships of the parties.

In view of all of the foregoing, the decision of the Circuit Court of Cuyahoga County (Ohio) in the case of *Thomas v. The Guarantee Title & Trust Company*,²⁰ appears to run contrary to the main stream of modern American Law. The first and third syllabi in this opinion, which have never been overruled in Ohio, read as follows:

1. An action against an abstractor to recover damages for negligence in making or certifying an abstract of title does not sound in tort, but must be founded on contract; and the general rule is that an abstractor can be held liable for such negligence only to the person who employed him.

3. A custom which would relieve a purchaser from the obligations imposed upon him by the doctrine of *caveat emptor*, which requires the vendee to protect himself by express covenants and investigation of the title which he is to acquire, is contrary to law.

In defense of the court in this case it must be pointed out that the facts show that the defendant abstractor was unaware of the purpose for which his abstract was to be used or the person to whom it was to be transmitted.

No discussion of the liability for negligent misrepresentation should be left without some reference to the case of *Ultramares Corporation v. Touche*.²¹ This landmark decision by Justice Cardozo is still the outstanding case in this area. It involved a firm of accountants who negligently certified a corporation's balance sheet with the expectation that it would be used as a basis for

¹⁹ 233 N.Y. 236, 135 N.E. 275 (1922).

²⁰ 81 Ohio St. 432, 91 N.E. 183 (1910).

²¹ 255 N.Y. 170, 174 N.E. 441, 74 A. L. R. 1139 (1931).

financial dealings in general but without knowledge of the particular plaintiff who would rely upon it in making a loan. The defendant accountants were held liable in deceit upon the ground that their neglect was so grave as to justify a finding of conscious ignorance. Liability in negligence was rejected because there was no contemplation of reliance by the *specific* plaintiff. We will return at a later point in this article to a consideration of this case in connection with the liability for fraud or deceit which may arise in such circumstances. Here it is sufficient to note that while this case is clearly in accord with other decisions in this area, it draws the clear line at which liability for negligent misrepresentation ends. That line is the point where the defendant is unaware of the particular plaintiff to whom his representations will be transmitted, even though he is aware of the fact that the person for whom he prepares his opinion or report will transmit it to some unknown person for the purpose of relying upon it.

III

In approaching the question of the liability of an attorney who gives advice as to foreign law, it is necessary at the outset to consider and then set aside all of those situations which involve misrepresentation actionable as a fraud. Such fraudulent representation might involve not only the substance of the law itself but the competence of the attorney including whether or not he was admitted to the bar of the foreign state, or whether or not he was an expert in the law of that state, or even the attorney's state of mind when he gives an opinion. When an attorney has made such fraudulent representation either as to the substance of the law or as to his own competence so as to induce the reliance of some person, he will, when his opinion later turns out to be erroneous, be liable not merely for his negligence in arriving at his opinion, but for the effects of the fraudulent representation itself. If the representation has induced reliance, it will make no difference whether he was careful or negligent in arriving at his opinion, for the action will not be founded upon negligent errors in his opinion but on the misrepresentation.

We have already considered negligent misrepresentation as to the substance of the law and it is worth noting at this point how fine the line is between mere negligent misrepresentation and misrepresentation actionable as fraud. An excellent example

of this problem is the case of *Ultramares Corporation v. Touche*.²² This is the earlier described case involving the firm of accountants who certified certain facts to be true as of their own knowledge. During the course of his opinion, regarding the cause of action in fraud, Justice Cardozo said:

The defendants certified as a fact true to their own knowledge that the balance sheet was in accordance with the books of account. If their statement was false they are not to be exonerated because they believed it to be true.

This statement does not, as one might think at first, deny the requirement of *scienter* in actions for fraud. It merely recognizes the fact that when a defendant "certifies as a fact true to his own knowledge" that he is making in effect two representations. He is representing that certain facts are true and he is representing that he is saying so from his own knowledge. To show that he actually believed the facts to be true relieves him of the onus of fraud as to only one of those representations.

The point to be stressed in regard to the foregoing is the fact that the accountants were held liable not for their fraud in certifying as true that which was not true, but for their fraud in saying that they knew something which they in fact did not know. Of course, an obvious distinction may be made between an accountant's certification of a record and an attorney's opinion regarding a doubtful legal matter. But the *Ultramares* case still demonstrates how fine the line is between fraudulent misrepresentation and negligent misrepresentation.

Setting aside misrepresentation actionable as fraud, we can now consider the liability of the attorney with regard to advice on foreign law as the liability sounds in the law of contract and negligence. It appears that there are at least four major variables in any of the liability situations which we will consider. The first is the state in which the attorney has been admitted to the practice of law. The second is the particular state in which he is actually practicing law. The third is the state whose law he is giving an opinion upon. The fourth is the state in which an action is brought against the attorney.

It is necessary to make at least one basic assumption on which to build the remainder of our argument. This is the assumption that an attorney admitted to the practice of law in Ohio

²² *Ibid.*

and actually physically practicing law in Ohio is entitled to give advice to his Ohio client as to the law of Ohio or any other foreign or alien jurisdiction. This appears to be an entirely reasonable assumption. Were it not valid, the subject of conflict of laws would be forbidden ground for 99 percent of attorneys, and every action would have to be brought in the state in which the cause of action accrued or it would have to be prosecuted by an attorney admitted to the bar in both the state of accrual and the state of the forum. This, manifestly, is not the way things are done.

The only reported cases which exist in this area bear out the argument that an attorney incurs only the ordinary liability of an attorney when he gives advice as to foreign law. Indeed, there is one case widely cited for the proposition that an attorney incurs no liability in such a situation. In *Fenaille v. Coudert*,²³ the court in its opinion said that attorneys in one state are not presumed to know the law of a sister state in the absence of an express declaration even though they accepted employment to draw up a contract to be performed in the second state.

It is rather doubtful that this case is the law anywhere today. Indeed, the proposition for which it is cited is considerably broader than the facts of the case would allow. It was actually only an action on the case brought against New York attorneys who drew a contract to be performed in New Jersey but failed to advise their client that under the laws of New Jersey such a contract required recording. The holding in *Fenaille v. Coudert* is even more remarkable when one considers that misrepresentations as to matters of foreign law are normally actionable when they are made by a layman. Although misrepresentations as to local law made by a layman are not ordinarily actionable since everyone is presumed to know the law, this is not true of foreign law. An entire annotation on this may be found at 24 A. L. R. 2d 1039.

Without specifically mentioning the case of *Fenaille v. Coudert*, a New York court, in *Degen v. Steinbrink*,²⁴ disapproved of the principle stated therein. This case involved a negligence action brought against a firm of attorneys who had improperly

²³ 44 N.J.L. 286 (1882); see also 6 C.J. 698, n. 43; and Ann. Cas. 1917 B, p. 11.

²⁴ 202 App. Div. 477, 195 N.Y.S. 810, aff'd 236 N.Y. 669, 142 N.E. 328 (1922). See also *In re Roel*, 3 N.Y. 2d 224, 165 N.Y.S. 2d 31, 144 N.E. 2d 24 (1957).

drawn a chattel mortgage on property located in another state. In the course of its opinion, the court said:

The law governing the creation of liens on personal property by chattel mortgages is statute law. This every lawyer should know, and further that the statute law of one state usually differs from the statute law of another as to form of the instrument, as to the form of acknowledgment and as to other requirements. When a lawyer undertakes to prepare papers to be filed in a state foreign to his place of practice, it is his duty, if he has no knowledge of the statutes, to inform himself, for like any artisan, by undertaking the work he represents that he is capable of performing it in a skillful manner. Not to do so, and to prepare documents that have no legal potency by reason of their lack of compliance with simple statutory requirements is such a negligent discharge of his duty to his client as should render him liable for loss sustained by reason of such negligence . . .

It would be a very dangerous precedent to adopt that in this state where, by reason of its being the financial center of the Union, members of the bar are called upon to advise as to large loans and to draft instruments securing such loans that must be filed or recorded in other states, attorneys could escape liability for unskillful and negligent work which had rendered the securities worthless and could shield themselves behind the plea: "I am a New York lawyer. I am not presumed to know the law of any other state."

In the case of *Rekeweg v. Federal Mutual Insurance Company*,²⁵ the United States District Court for the Northern District of Indiana in 1961 adopted the reasoning of *Degen v. Steinbrink*.

It is a fair conclusion from the foregoing cases that an attorney who is admitted to State "A" and who is physically in State "A" may give advice on the law of State "B." If he is sued in State "A" as a result of his action, he will enjoy whatever privileges or immunities attached to his status as an attorney and will have only the ordinary liability of an attorney in such a situation.

Does it make any difference in which state the action is brought against an attorney? Here, our earlier discussion of whether or not the action sounds in tort or in contract assumes some importance. As demonstrated, the liability of an attorney, whether based upon contract or upon a duty relationship, is de-

²⁵ 27 F.R.D. 431 (1961).

terminated by the law of negligence. That is to say, the ultimate question is only whether or not he has complied with the proper standard of care. Ordinarily, the law of the place where the injury is incurred governs negligence actions. The situation under consideration, however, appears to fall well within one of the exceptions to this rule. A person who is required by law to act or not to act in one state in a certain manner, will not be held liable for the results of such action or failure to act which occur in another state, and a person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state, so long as he is within the proper exercise of his privilege.²⁶ This statement is drawn from the *Restatement of the Law of Conflict of Laws*, Section 382, entitled Duty or Privilege to Act. Sub-section (2) of that section says:

A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.

One of the illustrations given for this rule is the following:²⁷

4. By the law of State 'X' a person who acting in a non-negligent manner harms another in a reasonable attempt to save the life of a third person is not liable to the other; by the law of State 'Y' he is liable. 'A' in State 'X' seeing 'B' about to murder 'C' shoots at 'B.' The bullet fails to hit 'B' but does hit and wound 'C' who is at the time standing in State 'Y.' The act of 'A' is privileged by the law of 'X' not by the law of 'Y.' If 'A' is not negligent in the use of his gun he is not liable to 'C.'

Transposing this illustration to the situation under consideration, it might read:

By the law of Ohio an attorney admitted to the practice of law in Ohio who gives advice in a non-negligent manner is not liable for errors in his opinion. By the law of State 'X' he is liable for such errors. An attorney giving advice in Ohio in a non-negligent manner which proves to be erroneous and causes a loss to his client in State 'X' is acting within his privilege and is not liable when sued in State 'X.'

²⁶ 11 Am. Jur., Conflict of Laws, § 182, p. 493.

²⁷ American Law Institute, Restatement of the Law of Conflict of Laws, § 382, p. 467.

The foregoing illustration assumes that there is some State 'X' in which an attorney not admitted to the practice of law in that state is absolutely liable for the errors in his opinion whether they be negligent or not. This, as we shall see, may not be the case.

The conclusion from the foregoing would seem to be that the particular state in which an action is brought against an attorney is not a determinative factor.

Having assumed that an attorney practicing in the jurisdiction where he is admitted is entitled to give advice on all the law and having come to the conclusion that the state in which an action is brought against him is not a material factor, we are left with only two situations to consider. They are:

- (1) An attorney admitted to the practice of law in State 'B' while physically in State 'A' and practicing law in State 'A' gives advice on the law of State 'B.'
- (2) An attorney admitted to the practice of law in State 'A' while physically in and practicing law in State 'B' gives advice on the law of State 'B.'

It needs no authority to assert that in the second situation above, the attorney is engaged in the unlicensed practice of law. The same may be said for situation number one. This conclusion is supported by the case of *In re Roel*.²⁸ In that case, a Mexican citizen and lawyer admitted to the practice of law in Mexico but never admitted to the New York bar maintained an office in New York for the purpose of giving advice on Mexican law. He was held to be practicing law in the state of New York without a license to do so, and was enjoined from further engaging in his occupation.

Since in both of the above situations the attorney is engaged in the unlicensed practice of law, it becomes immediately apparent that the question of whose law an attorney is giving advice on is not an important one. The important question is, "where is he practicing law, and where has he been admitted to the practice of law?" *An attorney is not practicing law in a foreign jurisdiction merely because he gives advice as to the law of that jurisdiction.*

The obvious inference is that an attorney is practicing law

²⁸ *Supra*, n. 24.

in the place where he is physically present when he gives his opinion. It is the law of that place that determines under what, if any, privilege he is acting.

IV

Assuming that an attorney finds himself in a position of practicing law without a license to do so, what then is his liability? There are no useful cases involving the question of an attorney licensed in one state practicing law in another state. There are, however, a few cases involving laymen practicing law. The first of these to be considered is the California case of *Biankaja v. Irving*.²⁹ In that case, the defendant was a notary public and an accountant who was asked by a testator to draw a will for him. It would appear that the testator was aware that the defendant was not an attorney. The defendant drew the will as requested and notarized the testator's signature but he did not have the will witnessed as required by California law. As a result, the testator's intended bequest failed and the plaintiff in this action was the intended legatee. The trial court found for the plaintiff and the Appellate Court affirmed. In affirming the decision of the trial court, the Appellate Court had first to deal with the older decision of *Buckley v. Gray*³⁰ which had held that a legatee whose right of inheritance had been defeated by an attorney's negligence in drawing a will had no right of action in negligence against the attorney because there was no privity of contract between them. The Appellate Court distinguished the cases in that in the earlier one the defendant had in fact been an attorney, whereas in *Biankaja v. Irving*, the defendant was not an attorney, and pointed out that the defendant's act violated the section of the business and professional code which provides for licensing of attorneys.

The Appellate Court went on to reason that since the defendant had violated that section of the code, he was guilty of negligence as a matter of law and therefore liable for the injury to the intended beneficiary.

The defendant in *Biankaja v. Irving* appealed his case to the California Supreme Court (whose opinion may be found at 320 P. 2d 16). The Supreme Court affirmed, but, rather than follow the dubious reasoning of the Appellate Court, flatly overruled

²⁹ ___ Cal. App. ___, 310 P. 2d 63 (1957).

³⁰ 110 Cal. 339, 42 P. 900, L.R.A. 862 (1895).

the earlier case of *Buckley v. Gray*. In its decision the Supreme Court abandoned almost without comment the Appellate Court's argument that violation of the licensing statute constituted negligence *per se*. The Supreme Court noted that the statute existed and said:

Defendant undertook to provide for the formal disposition of Maroevich's estate by drafting and supervising the execution of a will. This was an important transaction requiring specialized skill and defendant clearly was not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of law . . . which is a misdemeanor in violation of Section 6126 of the Business and Professions Code. Such conduct should be discouraged and not protected by immunity from civil liability as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action.

The foregoing case obviously leaves considerable doubt as to the law of California. It is impossible to tell whether the actionable negligence in that case was the undertaking of a job for which the defendant was not qualified or whether the negligence was in fact the obviously negligent act of failing to secure two witnesses to a will. In any case, the Supreme Court did not repeat the Appellate Court's statement that violation of the licensing statute was in itself negligence *pe se*.

The case of *Latson v. Eaton*³¹ was decided after the decision of the California Appellate Court in *Biankaja v. Irving* but before the decision of the Supreme Court. The defendant, James Latson, was not a licensed practitioner but he undertook to prepare certain promissory notes, deeds and mortgages, which task he did negligently to the result that the plaintiffs lost their property. In its opinion, the court cites the Appellate decision in *Biankaja v. Irving* and appears to adopt the view that violation of the licensing statute constitutes negligence *per se*. The syllabus of the court, however, is entirely different. It reads:

A person not licensed to practice law who for hire prepares promissory notes, deeds and mortgages, is liable to his employer for any damages caused by his *negligent preparation* of such documents. (Emphasis added.)

This syllabus would appear to be much more in line with the large body of decisions regarding various types of licensing stat-

³¹ ___ Okla. ___, 341 P. 2d 247 (1959).

utes. It has ordinarily been held that practicing a profession without a license is not the proximate cause of a person's injury. Rather it is the negligent practice which is the cause of the injury.

In *Mattieligh v. Poe*³² the court, in its opinion, cites both *Biankaja v. Irving* and *Latson v. Eaton* and also footnotes a Vanderbilt Law Review article³³ which interpreted unauthorized practice of law as negligence *per se*. It does not, however, speak up in favor of the principle that the violation of a licensing statute constitutes negligence *per se*. In fact the case is almost entirely devoid of reasoning one way or the other. Nine justices participated in the decision. One wrote the opinion, five concurred. One concurred in the result, three dissented. None of the nine presented any reasoning particularly *apropos* of the problem at hand.

Of course, cases involving defendants who were not admitted to the practice of law anywhere are not perfectly analogous to the situation under inquiry; that is, where an attorney is admitted to the practice in one state but is caught practicing in another state. The pessimistic assumption that such an attorney would be regarded merely as a layman may or may not be justified. The common practice indulged in today of having your attorney travel to various parts of the country to represent you may invite a different type of ruling.

An interesting analogy may be found in the area of medical malpractice cases involving physicians not properly licensed for the practice of medicine. The American Law Reports have treated this issue three times.³⁴ In the 1926 case of *Brown v. Shyne*,³⁵ it was held that the failure of a chiropractor to secure a license as required by state statute could not be made the basis of negligence in a malpractice suit since the violation had no direct bearing on the injury and the injury would not have been obviated had he been licensed. Earlier cases in California,³⁶ Michigan,³⁷ and Illinois³⁸ had similar holdings.

³² 57 Wash. 2d 203, 356 P. 2d 328 (1960).

³³ 11 Vanderbilt L. Rev. 599 (1957-8).

³⁴ 44 A. L. R. 1418; 57 A. L. R. 978; 13 A. L. R. 2d 148.

³⁵ 242 N.Y. 176, 151 N.E. 197 (1926).

³⁶ *Bute v. Potts*, 76 Cal. 304, 18 P. 329 (1888).

³⁷ *Janssen v. Mulder*, 232 Mich. 183, 205 N.W. 159 (1925).

³⁸ *Smith v. Swinehart*, 209 Ill. App. 175 (1917).

In 1927 a Massachusetts court, in *Whipple v. Grandchamp*,³⁹ sustained the correctness of an instruction to the jury to the effect that an unlicensed practitioner of medicine was to be held to the same standard of care as if he were a licensed practitioner. In so doing, however, the court commented that the trial court's instruction was probably more favorable to the defendant than he was entitled to. The whole tenor of the opinion implies that the Massachusetts Supreme Court was of the opinion that liability could have been predicated upon the failure to secure a license alone.

Cases in this area are difficult to analyse for the reason that while many of them are decided on what purports to be negligence law they contain facts which would also support an action for fraud. An example of a case involving actionable fraud is the case of *Harris v. Graham*.⁴⁰ The defendant represented himself to be a physician and he was not. Not only was he not a physician, he was a charlatan and a quack. The court recognized that this was an action in fraud and had no difficulty arriving at the defendant's liability. And the measure of the liability was whatever injury naturally and probably flowed from the misrepresentation.

In 1927 a New York court in *Monohan v. Devinny*,⁴¹ held that defendants who, though unlicensed, were practicing medicine should be held to the same standard of skill and care as prevail among those who are licensed. Other jurisdictions which have also held that the lack of the license is not the proximate cause of an injury are Washington,⁴² Georgia,⁴³ North Carolina,⁴⁴ and Ohio.⁴⁵ Thus the weight of authority, where such exists, supports the proposition that the failure of a physician to procure a license does not in itself give rise to any right of recovery in one of his patients. To maintain an action in malpractice the plaintiff must show that the result complained of was due to negligence or unskillful treatment. The same ruling lends

³⁹ 261 Mass. 40, 158 N.E. 270 (1927).

⁴⁰ 124 Okla. 196, 255 P. 710 (1927).

⁴¹ 223 App. Div. 547, 229 N.Y.S. 60 (1928).

⁴² Joly v. Mellor, 163 Wash. 48, 299 P. 660 (1931).

⁴³ Andrews v. Lofton, 80 Ga. App. 723, 57 S.E. 2d 338 (1950).

⁴⁴ Grier v. Phillips, 230 N.C. 672, 55 S.E. 2d 485 (1949).

⁴⁵ Willett v. Rowekamp, 134 Ohio St. 285, 16 N.E. 2d 457 (1938); Rush v. Akron General Hospital, 84 Ohio Abs. 292 (1957).

itself easily to application in the area of the attorney-client relationship.

V

Whether or not an attorney practicing law in a state in which he is actually admitted to the bar derives any benefit from employing other counsel when he is called upon to give advice on foreign law, is a matter open to some argument. There is no clear authority. In *Wildermann v. Wachtell*,⁴⁶ both the client and the attorney realized the necessity for the employment of foreign counsel to handle a procedural matter in connection with the collection of a claim against an estate in the foreign jurisdiction. Foreign counsel recommended by the local attorney was retained and, apparently at a meeting of the three parties, a formal retainer was signed by the client employing both the attorneys to collect the claim on a 50% contingency basis. The foreign attorney was negligent in the handling of his portion of the work. The court said:

The novel question arises therefore as yet undetermined in this state whether a lawyer here who retains with due care an attorney in a foreign jurisdiction to take care of procedural matters in the foreign state becomes *ipso facto* liable for any negligence of the foreign attorney even though the client has been informed of the necessity and reason for the retainer and has approved the course and choice of attorney . . .

Here the New York attorney recognized his inability to take care of Pennsylvania procedure and for that reason had his client retain a Pennsylvania attorney. A lawyer should not be held to a stricter rule in foreign matters than the exercise of due care in recommending a foreign attorney. To do so would subject him to hazards which he is not qualified either to anticipate or to prevent . . .

It was held that the local attorney was not liable for the negligence of the foreign attorney. This case, however, is not entirely *apropos* of the subject at hand. For one thing, it involves the conduct of procedural matters in a foreign jurisdiction where clearly the New York attorney could not act. Second, it is a situation in which it appears that *the client* retained the foreign attorney on the suggestion of local counsel. It was not a situation of local counsel delegating his job to a foreign attorney.

⁴⁶ 149 Misc. 623, 267 N.Y.S. 840 (1933).

An annotation to the foregoing case may be found at 47 *Harvard Law Review* 1056. It is compared with a number of other cases wherein attorneys have been held to be involved in joint ventures and therefore jointly liable for each other's negligence.

In *Floro v. Lawton*⁴⁷ one attorney could not present evidence at trial because of a conflict in his calendar. He talked with another attorney about doing the trial work and in effect the two attorneys agreed to divide the fee or returns from the case half and half. The procedure and the situation were explained to the client and he consented that the second attorney should try the case. It was held that each attorney was responsible to the client and if the attorney who tried the case was liable for malpractice, the first attorney would also be liable. The ruling in *Wildermann v. Wachtell* was urged by the defense in this case. However, the California court declined to follow it under the facts in this situation, and instead adopted the rule suggested by *Senneff v. Healy*⁴⁸ and *Hill v. Curtis*.⁴⁹ Both of those cases involved holdings to the effect that attorneys were involved in joint ventures in their activities. Both cases, however, involved questions of the rights between the attorneys involved, and not the question of the rights of the client.

At 5 *Am. Jur.*, Attorneys at Law, Section 47, Page 287, the author says:

... Nor does the fact that an attorney entrusts to another the performance of a duty undertaken by him relieve him from his obligation to exercise reasonable care, skill and diligence in the performance of the duty . . .

Indeed, there is authority both ample and venerable for the proposition that an attorney cannot delegate to another the tasks entrusted to him.⁵⁰ These cases, however, involve situations where the attorney has not obtained the prior consent of his client to the delegation, and are based on ordinary rules of the agent-principal relationship. In one annotation involving cases of this type,⁵¹ the author says:

⁴⁷ 187 Cal. App. 2d 657, 10 Cal. Rep. 98 (1961).

⁴⁸ 155 Iowa 82, 135 N.W. 27 (1912).

⁴⁹ 154 App. Div. 662, 139 N.Y.S. 428 (1913).

⁵⁰ *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134 (1857); *Cummins v. Heald*, 24 Kans. 600, 36 Am. Rep. 264 (1880); *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677 (1876); *Antrobus v. Sherman*, 65 Iowa 230, 21 N.W. 579 (1884).

⁵¹ *Ann. Cas.* 1917 B, page 18.

As a general rule an attorney has no power to delegate the authority reposed in him to another. . . . If he does so without his client's consent he becomes liable on principles of agency for negligence, default or wrong doing on the part of his substitute . . .

All of the cases cited in the foregoing annotation involve liability of the attorney to his client. It is interesting to speculate what difference it would make if the plaintiff were some third party such as the parties whose rights we are considering in this article. There, the rules of the principal-agency relationship should not be applicable since the parties are not attorney and client. If the use of foreign counsel were clearly made apparent in the attorney's opinion it should not result in vicarious tort liability. Liability for negligent selection of foreign counsel would, of course, remain (as well as liability for any breach of contract involved in the delegation).

VI

The conclusions to be drawn from this inquiry are these. An attorney has a very definite liability to persons other than his client for mistaken opinions when he knows in advance that the opinion will be transmitted to some specific person who will rely on it. This third person may sue the attorney on either a third party beneficiary contract theory or a tri-partite contract theory if the facts actually support such a relation, but it is not necessary for him to find a contract. He has a right of action in tort for the negligence. Indeed, even when a right of action in contract may be found, the measure of performance is exactly the same measure of due care which is used in a negligence action. It would appear that when the attorney's advice concerns foreign law, a mistaken opinion would create no special liability other than the normal liability for erroneous opinions so long as the attorney is physically practicing law in a place where he is admitted to the bar. Conceivably, however, an attorney could be regarded by a court when he is physically present in some other jurisdiction as being no better than a layman practicing law. The weight of authority, however, appears to support the proposition that even under those circumstances no unusual or absolute liability would arise for his mistakes.

Whether or not it is advisable to employ local counsel in such situations is a matter for some debate. A plaintiff could

argue that he contracted for the opinion of a particular lawyer not some other local counsel and he might argue that there had been an unlawful delegation of duty. However, an equally good argument may be made for the proposition that not employing local counsel is equivalent to not using due care in preparation of an opinion.

Making clear in a memorandum or opinion that local counsel has or has not been employed is probably more important than the actual decision of whether or not to use local counsel. Any misrepresentation actionable as fraud must be avoided at all costs, for absolute liability will certainly arise under such a situation. This applies also to making it clear in a memorandum or opinion that the lawyer rendering it is or is not admitted to the bar in the particular state whose law he is dealing with. It would appear to be important to negative any inference of particular expert knowledge in areas of foreign law. So long as these steps are taken and fraudulent misrepresentation is avoided it would appear that no unusual liability arises because of mistakes of the type considered here.