Shape up or Ship Out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents

Angela M. Vallario

University of Baltimore School of Law, avallario@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

Part of the Estates and Trusts Commons, Legal Ethics and Professional Responsibility Commons, Taxation-Federal Estate and Gift Commons, and the Tax Law Commons

Recommended Citation

SHAPE UP OR SHIP OUT:
ACCOUNTABILITY TO THIRD
PARTIES FOR PATENT
AMBIGUITIES IN
TESTAMENTARY DOCUMENTS

ANGELA M. VALLARIO*

I. INTRODUCTION

The attorney’s preparation of a testamentary document¹ (hereinafter sometimes referred to as a will² or revocable trust³) should

* Angela M. Vallario is an Assistant Professor at the University of Baltimore School of Law. B.S., University of Florida; J.D., University of Baltimore School of Law; LL.M. (Taxation), Georgetown University Law Center.

1. In this article, references to the term ‘testamentary’ document are intended to include a valid will and/or valid revocable trust. A will becomes effective upon the testator’s death. A revocable trust becomes irrevocable upon the settlor’s death. This article’s focus is limited to the disposition of the preparer’s property at his or her death through these testamentary documents. See Black's Law Dictionary 1513 (Bryan A. Garner ed., 8th ed., West 2004). Other testamentary documents, such as life estate deeds, are beyond the scope of this article.


3. Except for a few jurisdictions, the preparation of a revocable trust generally is not monitored by statutory formalities. See e.g. Fla. Stat. Ann. § 689.075 (West 1994 & Supp. 2004). Throughout this article all references to trusts are limited to a trust in

59
clearly and accurately reflect the client’s last wishes.\textsuperscript{4} Although these testamentary documents should reflect the client’s intent,\textsuperscript{5} they often fall short of accomplishing that goal.\textsuperscript{6} There are numerous examples of will and trust construction cases that exhaust tremendous resources in an effort to ascertain the client’s wishes or intent.\textsuperscript{7} Many of these cases involve the construction of patent\textsuperscript{8} and/or latent\textsuperscript{9} ambiguities which

which the settlor retains the right to revoke and has a retained interest for his or her life. Thus, the completed transfer of the beneficial interest takes place upon the settlor’s death. Dobris, supra n. 2, at 512.

\textsuperscript{4} See e.g. Auric v. Contl. Cas. Co., 331 N.W. 325, 329 (Wis. 1983) (stating it was a “constitutional right to make a will and have it carried out according to the testator’s intention”).

\textsuperscript{5} See Dobris, supra n. 2, at 302; see also Blodget v. Delaney, 201 F.2d 589, 593 (1st Cir. 1953) (finding that “the extent of a beneficiary’s interest is determined by the intention of the testator ascertained by reading his language with reference to the circumstances surrounding its use”); Dauphin Deposit Trust Co. v. McGinnis, 324 F.2d 458, 462 (3d Cir. 1963) (stating that “[the] intention of the testator must be ascertained from a consideration of the entire will, including the language used, the scheme of distribution, and the attendant circumstances”); Scott T. Jarboe, Student Author, \textit{Interpreting a Testator’s Intent From the Language of Her Will: A Descriptive Linguistics Approach}, 80 Wash. U. L. Q. 1365, 1366 n. 6 (2002) (stating that “the determination of the testator’s intent is the ‘pole star’ of judicial interpretation”).

\textsuperscript{6} Dobris, supra n. 2, at 302 (pointing out that sometimes what the client expects and what occurs are markedly different). This difference may result from the natural course of events or from attorney malpractice. This article addresses the latter instance and what may be done to protect client expectations and the interests of third parties.

\textsuperscript{7} See infra pt. IV.B. (providing examples of will construction cases); see also Hebden v. Keim, 75 A.2d 126, 128 (Md. 1950) (finding that it was not the testatrix’s intention to give the sum of $8,000 to her brother’s estate if he predeceased her, and therefore, demonstrating that costs of litigation could easily exceed the $8,000 harm to the beneficiary).

\textsuperscript{8} See e.g. Hawman v. Thomas, 44 Md. 30, 49 (App. 1876) (stating that “patent ambiguities appear[ing] on the face of the writing itself, as a general rule, cannot be explained or removed by extrinsic evidence. In such a case, the court’s [function is to] ascertain the meaning of the words actually employed, not the secret intention of the party); Maguire v. Maguire, 34 So. 443, 446 (La. 1903) (holding that when interpreting wills, the intent of the testator guides the court, the construction of a will must not put into the mouth of the testator that which he refrained from saying); In re Wainwright’s Estate, 101 A.2d 724, 725 (Pa. 1954) (stating that “where a testator fails to [provide] for a contingency which actually happens, courts do not have authority to insert a provision into the will and supply the omission under the assumption that it was the intention of the testator”).

\textsuperscript{9} A latent ambiguity is discovered when the personal representative attempts to carry out the provisions of the will or trust. See Scheuer v. Tomberlin, 240 So. 2d 172, 176 (Fla. App. 1st Dist. 1970) (finding the absence of actual grandchildren in the face of a bequest for the benefit of “presently living grandchildren” was a latent ambiguity
should have been resolved by appropriate drafting. This article’s scope is limited to patent ambiguities caused by the attorney’s negligence and their detrimental impact on third parties. In these situations, the patent ambiguity is easily identified and the claim of negligence is clear. A patent ambiguity is obvious from the face of the will and is easily discovered prior to the testator’s death. For example, a patent ambiguity exists where two different provisions of a will dispose of the same plot of land to different devisees. The attorney’s close reading of the will should have discovered this error. The attorney’s failure to correct the patent ambiguity prior to the testator’s death has detrimental consequences for the third party harmed. Extrinsic evidence is generally not admissible to resolve a patent ambiguity, because courts are unwilling to add to or detract from the written words of the will.

The Rules of Professional Conduct require competent representation of the estate-planning attorney (hereinafter “Ethical Rule”). The existence of a patent ambiguity in a testamentary document suggests that the estate-planning attorney has in some way failed to render competent legal services. Although a violation of this

in the will. Extrinsic evidence, including the relation of the parties was admissible to show the persons to whom decedent intended).


11. This author believes that attorneys should also be accountable to third parties in the case of some latent ambiguities, but that issue will be addressed in a subsequent article.


14. Model R. Prof. Conduct 1.1 (ABA 2004). This rule requires that a “lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Id.

15. The term ‘estate-planning attorney’ is used throughout this article to mean the attorney responsible for preparing the will or revocable trust. The reference in no way suggests a specialization or expertise in the estates and trust field and excludes non-lawyers. If a non-lawyer prepares the testamentary document, it is unclear as to what duties and responsibilities attach. See Angela M. Vallario, Living Trusts and the Unauthorized Practice of Law: A Good Thing Gone Bad, 59 Md. L. Rev. 595, 620-22 (2000) (discussing the standard of care and problems associated with non-lawyers engaging in this service).
Ethical Rule does not give rise to a malpractice action, a patent ambiguity reflects so poorly on the attorney’s standard of care that a permitted inference of negligence should be drawn.

When the testamentary document includes a patent ambiguity, a malpractice action brought by the estate is of little consequence because the estate is rarely lessened in value by the negligence. Instead, third parties who lose their inheritances due to a patent defect should have legal recourse to be made whole. In this instance, compensatory damages should be used as the appropriate remedy in which what would have been received but for the error is compared to what was received. Yet, current law does not provide a remedy


17. The standard of care in drafting wills varies among jurisdictions. A majority of jurisdictions apply one of three standards: An objective standard, community standard or subjective standard. See e.g. Wright v. Williams, 121 Cal. Rptr. 194, 199 (2d Dist. 1975) (discussing that the objective standard requires the attorney to use reasonable prudence and skill); Transamerica Ins. Co. v. Keown, 451 F. Supp. 397, 401 (D.N.J. 1978) (stating that the community standard compares an attorney’s conduct to that of other attorneys practicing in the same or a similar community); Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966). The subjective standard is based on the premise that if an attorney acts on his or her honest, well-founded belief, he or she will not be liable.

18. See pt. III.B.1 (discussing the permitted inference of negligence due to the existence of a patent ambiguity).

19. See Bradley E. S. Fogel, Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney—Client Relationship in Estate Planning, 68 Tenn. L. Rev. 261, 267 (Winter 2001) (discussing the compelling case for estate-planning malpractice. “In order to recover for legal malpractice, a plaintiff must prove: (1) [T]he attorney owed a duty of care to the plaintiff, (2) the attorney violated that duty, (3) the attorney’s negligence was the proximate cause of injury to the plaintiff, and (4) damages.”).


21. See Dan B. Dobbs, Law of Remedies 3 (2d ed., West 1993); see also Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1951) (explaining that “[a] fundamental principle of the law of damages is that a person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with loss sustained in consequence of defendant’s act which gives rise to action”); Phillips v. Chesson, 8 S.E.2d 343, 347 (N.C. 1950) (determining that the “objective of any
because an attorney's duty to his or her client to draft a testamentary
document free from patent ambiguities does not automatically extend
to third parties at the client's death.22 In order to provide an adequate
remedy to third parties when a testamentary provision fails because of
a patent ambiguity, changes in the law are warranted. The attorney's
duty to draft testamentary documents free from patent ambiguities must
automatically extend to third parties and extrinsic evidence must be
admissible for the third party to prove harm. These changes will
provide third parties with both recourse to pursue their claim and a
remedy.

This article first describes patent ambiguities and the rule of
construction relating to the admissibility of extrinsic evidence in
ascertaining a testator's intent.23 Secondly, the article addresses the
attorney's duty of care owed to clients in the preparation of
testamentary documents. Thirdly, the article analyzes and critiques the
existing methods used by third parties bringing a cause of action
against the negligent drafter. Finally, this article addresses alternatives
and concludes that the only way to adequately police and deter patent
errors from occurring is to allow the malpractice action to proceed and
allow for the admission of extrinsic evidence so the third parties are
able to establish harm.

II. PATENT AMBIGUITIES AND THE ADMISSIBILITY OF EXTRINSIC
EVIDENCE

A. PATENT AND LATENT AMBIGUITY DISTINCTIONS

The existence of a patent ambiguity in a testamentary document
prompts will or trust construction litigation because the testamentary
document is in some way facially unclear. The classification of the
uncertainty as a patent ambiguity arises when the uncertainty is

22. See infra pt. IV.B. (discussing approaches for accountability to third parties).
23. The term 'testator' is used generically throughout this article to describe a male
or female person who prepares a will, and also the client signing the testamentary
document. In the case of a revocable trust the person creating the trust is referred to as
"settlor."
“apparent on the face” of the document itself.  

This article’s discussion of a patent ambiguity is limited to when the ambiguity amounts to a contradiction, or requires the court to fill in the blank as to a beneficiary or property. For example, in Knupp v. District of Columbia, the decedent’s will stated that his residual estate was to pass to a person specified in another paragraph in the will, where no designee was named. This uncertainty was labeled a patent one. The court excluded extrinsic evidence in support of the intended beneficiary, despite the reliability of such evidence, including an acknowledgment by the drafting attorney that Mr. Knupp was the intended beneficiary. In the case of a patent ambiguity, without the aid of extrinsic evidence, the ambiguous provision fails. In Knupp, the decedent’s property escheated to the District of Columbia. The patent defect and the scrivener’s carelessness are apparent to a layperson from the face of the document without the requirement of an expert.

When an attorney drafts a testamentary document that includes a patent ambiguity, he or she should be liable to those injured. Liability

24. E.g. Gafford v. Kirby, 512 So.2d 1356, 1362 (Ala. 1987) (characterizing a patent ambiguity as one that reflects an inadequacy inherent on the face of the document existing since the execution of the instrument); In re Estate of Corrigan, 358 N.W.2d 501, 503 (Neb. 1984) (finding the ambiguity a patent one, that is, one appearing on the face of the document, from the language used); see also In re Butterfield’s Estate, 275 N.W.2d 262, 267 (Mich. 1979); Boatmen’s Union Nat. Bank v. Welton, 640 S.W.2d 497, 502 (Mo. App. 1982).

25. See Succession of Neff, 716 So. 2d 410, 411-412 (La. App. 1998) (labeling ambiguity patent but allowing extrinsic evidence where a will containing two residuary clauses with different dispositive schemes—one provision devised the testatrix’s disposable estate to one daughter and the other disposed the same property in equal shares to both daughters); Morse v. Zatkiewicz, 168 S.E. 219, 222-224 (N.C. 1969) (considering extrinsic evidence to determine whether testatrix intended to pay alimony to her son’s ex-wife where the testatrix’s will provided for the payment of her son’s creditors but named someone other than her son as the sole beneficiary of her estate).


27. Wilson v. First Florida Bank, 498 So.2d 1289, 1291 (Fla. 2d Dist. App. 1986) (finding the defect a patent ambiguity where a will contained detailed provisions with respect to how a university should award scholarships, but contained no words of conveyance).


29. Id. at 703. Property escheats when the decedent dies without heirs. Dobris, supra n. 2, at 72. When property escheats it passes to the state or to a designated agency of the state. Black’s Law Dictionary at 584.

30. The defect is so obvious there is no need to ascertain the opinion of an expert.
in this situation should occur because, like the Res Ipsa Loquitur doctrine,\textsuperscript{31} such an obvious defect "speaks for itself" and reflects a lack of due care. To impose a duty on the attorney to draft testamentary documents free from patent ambiguities is not unduly burdensome,\textsuperscript{32} nor does it amount to a duty to draft litigation-free documents.\textsuperscript{33} Therefore, when a patent ambiguity exists in the decedent's testamentary document, the malpractice action against the attorney should be straightforward because patent defects do not exist in this instance but for some degree of negligence.

More often, will and trust construction cases arise because of the existence of a latent ambiguity.\textsuperscript{34} A latent ambiguity arises when the testamentary provisions of the document are applied to the testator's property or beneficiaries.\textsuperscript{35} For example, in one case the word "home"
was ambiguous, and will construction litigation was required to determine whether the decedent intended the word to mean the principal residence or the residence and abutting acreage. Latent ambiguities can arise for reasons other than the attorney's negligence, such as a miscommunication by the client. For example, a will that bequeaths "my 1999 BMW to Joe" results in a latent ambiguity if at the testator's death, he had a son and grandson both named Joe. This latent defect, which becomes apparent only when the personal representative attempts to carry out the provisions of the will, could have resulted from a number of reasons. In order to ascertain the testator's intended specific legatee, extrinsic evidence, such as the testator's lack of knowledge of his grandson, is admissible to shed light on the testator's intent.

B. RULES OF CONSTRUCTION

The classification of the ambiguity as patent or latent is important in will and trust construction cases because there are different rules regarding the admission of extrinsic evidence used to resolve the uncertainty. The resolution of the ambiguity with the admission of extrinsic evidence often allows the third party to take, making the malpractice action moot.

"latent ambiguity" exists when the will appears to convey a sensible meaning on its face, but it cannot be carried out without further clarification). See also In re Lepley's Estate, 17 N.W.2d 526, 529 (Iowa 1945); Carney v. Johnson, 422 P.2d 486, 488 (Wash. 1967); In re Gibbs' Estate, 111 N.W.2d 413, 417 (Wis. 1961).

36. See In re Sandersfield's Estate, 9 Cal. Rptr. 447, 452 (App. 4th Dist. 1960) (stating that when ascertaining intent, other doctrines such as plain meaning, personal usage exception, and others are employed); see also Joseph W. deFuria, Jr., Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation, 40 Cath. U. L. Rev. 1, 13 (1990).

37. Latent ambiguities could also arise from the attorney's negligence. For example, the failure of the attorney to ascertain the testator's blood relatives and his or her failure to better identify the specific legatee could have caused the latent ambiguity. See infra Part III.A.1. (discussing the attorney's obligations in obtaining accurate and complete information).

38. But see Gifford v. Dyer, 2 R.I. 99, 102 (1852) (holding that the mistake doctrine would not be applicable where a testatrix drafted her will with the impression that her son had predeceased her because in using mistake "it must also appear what would have been the will of the testatrix but for the mistake").

39. Wilson v. First Florida Bank, 498 So.2d 1289, 1292 (Fla. App. 2d Dist. 1986) (allowing the residual estate to pass to a university because of the will's failure to otherwise dispose of it). See also In re Campbell, 42 Haw. 586, 592 (1958) (holding...
1. **Admissibility of Extrinsic Evidence for Patent Ambiguities**

Historically, the rule of construction required a patent ambiguity to be resolved from the document itself, not from extrinsic evidence ("no-extrinsic evidence rule"). It is believed that an ambiguity which appears in the writing can only be cured by the writing itself; i.e., by merely construing the writing. The argument is that if the words in the will had to be written and the testator constructed the will with thought and express language, and did not go outside to express his intent, then those who read the written words are not allowed to go outside the will to aid in its interpretation.

The testator's absence and the uncertainty surrounding the extrinsic evidence have precluded its use to resolve patent ambiguities. Extrinsic evidence would make the will hollow. In that "if two constructions of a will are each fairly possible, one of which indicates absurd or unjust intention, and the other indicates reasonable and fair intention, [the] courts [prefer] that the construction which indicates a reasonable and fair intention"); *Poe v. Sheehan*, 151 N.E.2d 660, 665 (Ohio App. 8th Dist. 1958) (finding that, where decedent has expressed his wishes for succession of his property in a properly executed will, every reasonable effort must be made to avoid intestacy).

A third party provided a remedy by the court from the estate does not have a second cause of action against the attorney. However, when the third party is not made whole because the extrinsic evidence is insufficient or inadmissible, a malpractice action will more likely proceed. *See Knupp v. Schoebor*, 1992 WL 182323 at *5 (D.C. July 14, 1992).

1. **Hawman v. Thomas**, 44 Md. 30, 46 (1876) (holding that using extrinsic evidence for the purpose of showing what property was intended to be conveyed was inadmissible because it failed to state any property on which a bequest could operate and there was not an expression elsewhere in the will by which the omission could be supplied); accord *Helmer v. Voss*, 646 S.W.2d 738, 741 (Mo. 1983) (admitting extrinsic evidence to resolve patent ambiguity about the identity of beneficiaries, their relationship to the testators, and the nature and extent of testators' holdings; but then looking to the language of the will after such explanatory material had been considered); *but see Matter of Estate of Arend*, 373 N.W.2d 338, 342 (Minn. App. 1985) (admitting extrinsic evidence to resolve both patent and latent ambiguities in will); *In re Hurley*, 248 N.W. 194, 195 (S.D. 1933) (allowing the use of extrinsic evidence in a case involving a patent ambiguity).


3. *Id.* at 417 (explaining the historical development of the introduction of extrinsic evidence).

the case of a patent ambiguity, the concern over the reliability of such evidence also stifled its introduction. For example, a will that disposes of property to an unknown beneficiary would permit countless claims, causing great inconveniences and uncertainty.\(^4^6\) In excluding extrinsic evidence, one court stated no language in the will could lead a court to infer the testator's intent.\(^4^7\)

The reluctance of the courts to admit extrinsic evidence to reform a will in accordance with the testator's objective intent is warranted.\(^4^8\) There will always be some risk and uncertainty associated with the use of extrinsic evidence. The nature of a will and its effectiveness upon the creator's death prohibit courts from ascertaining the testator's actual intent. When a testator goes through the effort of preparing a will, he or she has the right to expect that the language used in the testamentary document will be honored.\(^4^9\) Without these expectations, the preparation of the will is meaningless. For these reasons this article is not proposing that the fundamental purposes of will and trust formalities be ignored even in cases of an attorney's obvious negligence. However, when an attorney takes on the responsibility of preparing a testamentary document, he or she should not only understand and appreciate its significance but also take additional precautions to ensure it is prepared correctly and accurately.

The application of the no-extrinsic-evidence rule to a testamentary document involving a patent ambiguity is illogical, because a contradiction,\(^5^0\) or the failure to identify a beneficiary\(^5^1\) or property\(^5^2\) can never be resolved from the document itself. The application of the no-extrinsic-evidence rule causes the patent

---

45. See Dobris, supra n. 2, at 210 (discussing the Statute of Frauds and Wills Act requirement for a writing protects the testator from fraud, undue influence, and mistake). If by using extrinsic evidence someone is permitted to add or change the written words of the testator, the will would be of no practical use. Dukeminier & Johanson, supra n. 10, at 426.

46. Thayer, supra n. 42, at 416.

47. Id. at 417 (excluding extrinsic evidence resulted in the beneficiary, the testator's son, not taking).


49. Jarboe, supra n. 5, at 1374 n. 59.

50. Succession of Neff, 716 So. 2d 410, 411 (La. App. 4th Cir. 1998).


provision to fail and eliminates any chance of recovery from the estate for the third party harmed. Instead, the testator’s heirs or unintended beneficiaries are more likely to benefit from the patent ambiguity when the court refuses to admit extrinsic evidence. The application of the no-extrinsic-evidence rule to patent ambiguities places third parties who fall victim to a patent defect in a much worse position than third parties affected by a latent defect.\textsuperscript{53} In the case of a patent defect, third parties will be forced to bring a malpractice action against the attorney.\textsuperscript{54} Third parties also face the roadblock of satisfying the jurisdiction’s rule concerning the attorney’s liability to third party beneficiaries.\textsuperscript{55} If they are unable to bring the malpractice action because the jurisdiction follows strict privity,\textsuperscript{56} or if they are unable to satisfy the jurisdiction’s exceptions to strict privity\textsuperscript{57} or other approaches,\textsuperscript{58} it is shocking that the third party harmed by such an obvious defect may be without a remedy and that the attorney responsible may be immune from liability.

2. Admissibility of Extrinsic Evidence for Latent Ambiguities

The rule of construction as to extrinsic evidence developed differently for latent ambiguities. The courts began in the sixteenth century, grudgingly and cautiously, to allow extrinsic evidence to explain latent uncertainties.\textsuperscript{59} Courts were willing to admit extrinsic evidence to shed light on the testator’s intent and clarify that which was written,\textsuperscript{60} but not to add to\textsuperscript{61} or detract from the written words of the

\textsuperscript{53} See supra pt. II.B.2. (discussing the rule of construction and outcomes for latent ambiguities).
\textsuperscript{54} Knupp v. Schoeber, 1992 WL 182323 at **2-4 (D.C. July 14, 1992); Knupp v. D.C., 578 A.2d at 705.
\textsuperscript{55} See infra pt. IV. B (discussing the attorney’s accountability to third parties when the testamentary document he or she has prepared includes a patent ambiguity).
\textsuperscript{56} Infra pt. IV.B.1.
\textsuperscript{57} Infra pt. IV.B.2.
\textsuperscript{58} Infra pt. IV.B.3.
\textsuperscript{59} Thayer, supra n. 42, at 416.
\textsuperscript{60} See Dukeminier & Johanson, supra n. 10, at 427; see also Succession of Bacot, 502 So. 2d 1118, 1123 (La. App. 4th Cir. 1987) (admitting extrinsic evidence to determine the testator’s relationship with the intended legatee where the testator left a holographic will which left all to “Danny” with whom testator lived and maintained an ongoing homosexual relationship, and not to other “Dannies” with whom testator allegedly had homosexual relationships lasting only several months).
\textsuperscript{61} See Assoc. of Survivors of the Seventh Ga. Regiment v. Larner, 3 F.2d 201, 203
will.62 For example, in the "my 1999 BMW to Joe" hypothetical, the latent ambiguity lies in which "Joe" was intended by the testator.

The classification of an ambiguity as patent or latent varies from jurisdiction to jurisdiction,63 which has led to drastic differences as to the admissibility of extrinsic evidence and outcomes.64 Additionally, in an effort to arrive at a more equitable result, some jurisdictions have eliminated the distinction, noting that the patent/latent distinctions served "no useful purpose."65 In jurisdictions where the distinction

---


63. See In re Sandersfeld's Estate, 9 Cal. Rptr. 447, 451 (App. 4th Dist. 1960) (labeling the meaning of the word "home" as a latent ambiguity and allowed extrinsic evidence); Carlisle v. Est. of Carlisle, 252 So. 2d 894, 895-96 (Miss. 1971) (finding that the word meaning of the "home" a patent ambiguity and thus allowing extrinsic evidence).

64. See Survey of Cases, supra n. 34 (presenting a survey of malpractice case where the courts' different labeling has lead to a different rule with respect to the admission of extrinsic evidence).

65. See e.g. In re Estate of Cole, 621 N.W.2d 816, 819 (Minn. 2001). The will bequeathed to appellant Vining "the sum of two hundred thousand dollars ($25,000)." Id. at 817. The attorney submitted an affidavit that it was the testator's intent to leave $25,000 not $200,000. The Supreme Court of Minnesota allowed extrinsic evidence to ascertain the testator's intent, and stated,

[W]e are satisfied that the trial court correctly denigrated the usefulness of a distinction between patent and latent ambiguities for determining what type of extrinsic evidence should be considered when construing ambiguous or contradictory provisions. Because it is reasonable for the Minnesota judiciary to weigh evidence of the testator's declarations of intent, the basis of the patent/latent distinction appears outmoded. . . . We appreciate in general, the frustration scriveners encounter in trying to express perfectly their client's wishes, which frequently creates ambiguities, such that justice requires consideration of extrinsic evidence to determine intent . . . we no longer view testimony about the testator's declarations of intent as inherently unreliable.

Id. at 819.
continues, the exclusion of extrinsic evidence to resolve patent ambiguities understandably stems from the possibility of fabrication. 66

This article recognizes that there are distinctions between patent and latent uncertainties. The disparate treatment by the courts over the introduction of extrinsic evidence is analyzed. 67 The existence of a patent ambiguity in a testamentary document violates strong public policy and the law must provide an adequate remedy to a third party harmed by the patent ambiguity. In order to provide this remedy, the attorney's duty to draft testamentary documents free from patent ambiguities must be automatically extended to third parties and extrinsic evidence must be admissible to show harm. 68

III. DUTY OF CARE OWED TO CLIENT IN THE PREPARATION OF WILLS AND REVOCABLE TRUSTS

When an attorney renders services to prepare a will or trust, an attorney-client relationship 69 exists between the testator and drafting attorney, and it is the testator to whom the attorney owes "professional responsibility." 70 The attorney is expected to draft a valid document 71 that disposes of the client's property in accordance with the client's

68. See infra pt. V (discussing that extrinsic evidence should be admissible to deter future harm).
69. 48 Am. Jur. Proof of Facts 2d Existence of Attorney-Client Relationship 525 (1987). The existence of an attorney-client relationship involves a question of fact. Courts will find an attorney-client relationship where there is a contract for legal services between particular parties or a gratuitous undertaking. Robinson v. Benton, 842 So. 2d 631, 635 (Ala. 2002) (citing Williams v. Jackson Co., 359 So. 2d 798 (Ala. Civ. App. 1978)). Upon the establishment of an attorney-client relationship, a fiduciary responsibility exists and carries with it the requirement of utmost good faith and loyalty. See e.g. Homa v. Friendly Mobile Manor, Inc., 612 A.2d 322, 327 (Md. App. 1992). Most of the duties flowing from the client-lawyer relationship attach immediately. Once it is determined that a duty is owed by the attorney to the client, the general rule with respect to the liability of an attorney for failure to properly perform his or her duties, is that the attorney is required to render ordinary skill in the performance of the tasks which he or she undertakes. Blair v. Ing, 21 P.3d 452, 460 (Haw. 2001) (citing Lucas v. Hamm, 364 P.2d 685 (Cal. 1961)); see also Model R. of Prof. Conduct 1.1, 1.3 & 1.7 (ABA 2003) (discussing the relevant duties of particular importance in the estate-planning context).
70. See Model R. of Prof. Conduct R. 1.1, 1.3, 1.7.
71. See supra nn. 2-3 (discussing what is required to prepare a valid will and trust).
testamentary wishes, provided these wishes fall within legal boundaries. Various limitations are imposed on the testator's wishes, such as provisions that violate public policy, provisions that attempt to defeat the spouse's elective share, and provisions drafted in violation of the rule against perpetuities. To the extent the client desires to incorporate provisions beyond legal parameters, the attorney is obligated to advise the client as to the risks associated therewith. Furthermore, the attorney's failure to counsel the client on legal boundaries could result in a malpractice action.

Other than a jurisdiction's statutory formalities or requirements, there are no requirements or mandatory procedures for the preparation of a will or trust. Various obligations associated with the preparation of a will have developed as case law. One court stated when an attorney is hired to prepare a will [or draft a revocable trust], the attorney's obligation is to: (1) Inquire into the client's heirs at law, (2) offer a proper explanation, (3) advise the client.

72. Will provisions requiring waste, or conditioned on the beneficiary obtaining a divorce, are examples of provisions which violate public policy. See In re Estate of Pace, 400 N.Y.S.2d 488, 492 (1977) (stating that a will provision, which directed the fiduciary to demolish two houses located on testator's property, violated public policy and was not enforceable, because the cost of demolition, annual property taxes, and maintenance without the benefit of rental income to offset such losses was considered waste); see also Fineman v. C. Natl. Bank of Cleveland, 175 N.E.2d 837, 841 (Ohio App. 8th Dist. 1961) (holding that the public policy of Ohio does not countenance a bequest or device conditioned on the beneficiary's obtaining a separation or divorce from his wife).


75. For example, should the testator wish to disinherit his or her estranged spouse, the attorney is obligated to advise the client of the surviving spouse's right to file an election against the will and frustrate his or her testamentary plan. See Vallario, supra n 73, at 541-42.

76. See Lucas v. Hamm, 364 P.2d 685, 686 (Cal. 1961) (allowing a malpractice action by the will beneficiaries for the attorney's failure to draft a trust in accordance with the rule against perpetuities).

77. See supra n. 2 (noting the formality requirements of a will).

78. See supra n. 3 (noting the requirements of a trust).

79. Dobris, supra n. 2, at 7. Heirs are determined at one's death as the takers under
as to his or her heirs at law, (4) explain the significance of including or excluding all heirs at law in a will, and (5) prepare a will according to the client's [legal] directions.  

If essential steps and procedures are followed, the patent ambiguity problem discussed herein could be minimized. Thus, this article suggests that when an attorney renders estate-planning services, he or she should incorporate detailed steps and procedures which do not overly burden the estate-planner and will likely result in testamentary documents being prepared free from patent defects.

A. ESSENTIAL STEPS AND PROCEDURES THAT SHOULD BE FOLLOWED IN THE PREPARATION OF TESTAMENTARY DOCUMENTS

There are several steps in the preparation of testamentary documents, which if incorporated into one's legal practice would achieve the attorney's duty to draft testamentary documents free from patent ambiguities. As the following sections detail, in the preparation of a will or revocable trust, the attorney must obtain information regarding the client, his heirs, and legatees. He or she then must prepare and review the documents, supervise the execution process, and implement the plan. Additionally, duties associated with the decedent's intestacy statute. The decedent's heirs are not known when the testator is preparing his will. Therefore, this inquiry should include blood relatives such as descendants, ancestors and collaterals. Additional potential heirs, including one's fiancée and loved ones, should be explored with the client. Id.

80. Leak-Gilbert v. Fahle, 55 P.3d 1054, 1062, 1056 (Okla. 2002) (holding that absent the testator's request, the attorney had no duty to investigate the testator's heirs where four grand-children from the testator's deceased son were considered pretermitted heirs and entitled to inherit).

81. Id. (discussing the obtain information step of the estate-planning process).

82. Id. pt. III.A.2. (discussing the preparation and review step of the estate-planning process. Carelessness in the preparation and review stage is likely the culprit for a testamentary document with a patent ambiguity).

83. Id. pt. III.A.3. (discussing the will or trust execution ceremony and responsibilities associated therewith).

84. In the case of a revocable trust, the plan is implemented with the transfer of assets during the settlor's life so that upon his or her death these non-probate assets pass in accordance with the trust terms. Id. pt. III.A.4. (discussing the implementation process).
will’s safekeeping and client communication are oftentimes part of the estate-planning process. 85

1. **Obtaining Information**

The estate-planning process commences with the collection of information from the client. The attorney should obtain complete and accurate information regarding relevant matters such as domicile, 86 family members and loved ones, the title and value of probate and non-probate property, and beneficiary designations on contract arrangements such as life insurance policies, annuities, and retirement plans. Additionally, information such as citizenship, 87 joint owners of jointly held property, and contribution components 88 are essential to providing competent estate-planning services. 89

85. Dobris, *supra* n. 2, at 218. Ancillary to estate-planning services are issues of the document’s safekeeping and continued client communication. The attorney should advise his or her client with respect to appropriate safekeeping options and risks associated therewith. This advice is best conveyed by cover letter and reiterated orally at the execution ceremony. *Id.*

No jurisdiction imposes a duty of continued client communication on the estate-planning attorney after the rendering of estate-planning services. Although, changes in the law may warrant alterations to one’s testamentary documents. Absent an ongoing relationship, attorneys are not responsible for advising clients to revisit their estate plans. For example, many estate plans implemented aggressive inter vivos gifting programs based on the $600,000 Federal exemption amount. I.R.C. § 2010 (1986). These plans should be re-examined in light of the scheduled increases. I.R.C. § 2010 (2004).

Another more recent example includes the attorney’s obligation to contact client due to legislative changes. In 2004, the Federal exemption amount is $1,500,000 but some states capped the state estate tax at $1,000,000. *See* Md. Sen. 508, 2004 Gen. Assembly, Reg. Sess. (2004). After the state legislation was enacted, many estate plans need to be amended. Yet, an attorney is not under an obligation to notify estate-planning clients to revisit their estate-plans in light of the legislative changes. Even if the attorney retains the original testamentary document, it is unlikely that any court would impose a general duty of continued communication on the attorney-safekeeper. *Id.*


87. *See* Dobris, *supra* n. 2, at 461; I.R.C. § 2001(a) (West 2002). The imposition of the Federal transfer tax is imposed on every decedent who is a citizen or resident of the United States. I.R.C. § 2056(d)(1). If the surviving spouse of the decedent is not a United States citizen the marital deduction is disallowed. *Id.*

88. The contribution of consideration towards jointly held property is important in determining the property of the estate for Federal estate tax purposes. *See* I.R.C § 2040 (stating there shall be excepted [from the value of joint property] such part of the value of such property as is proportionate to the consideration furnished by such other
Much of this information is obtained from a client-prepared form and/or client interview. Generally, the client-provided information is relied upon and not verified by the attorney. In most cases, to impose a duty of verification would “expand the obligation of a lawyer who drafts a will beyond reasonable limits,” would prevent the attorney from providing reliable and economical services, and would place an unreasonable burden on the attorney. If estate-planning attorneys are required to verify client-provided information or hire employees to do so, the cost of providing this service will be passed onto the client, thus making it too expensive for many individuals. Although not the norm, a duty to investigate may be imposed if a client requests investigation or if circumstances demonstrate otherwise. For example, the duty of inquiry may be imposed on the attorney if the client becomes reasonably confused as to what information is to be provided.

89. Model R. of Prof. Conduct 1.1 (ABA 2003).
90. Leak-Gilbert v. Fahle, 55 P.3d 1054, 1057-58 (Okla. 2002) (holding that where decedent’s heirs sued decedent’s lawyer for not including them in decedent’s will the lawyer was not obligated to conduct an independent investigation of the decedent’s heirs, apart from the information provided to the lawyer by the decedent, unless requested to do so).
91. Id. at 1058 (citing Stangland v. Brock, 747 P.2d 464, 469 (Wash. 1987)). See Ventura County Humane Society v. Holloway, 115 Cal. Rptr. 464, 469 (App. 1st Dist. 1974) (holding that, where the drafter was liable for costs incurred as a result of a latent ambiguity, the attorney could not be accountable for using certain words and that to impose such a burden on the attorney would amount to an insurmountable burden).
92. Leak-Gilbert, 55 P.3d at 1058.
93. Id.
94. Id. at 1057.
95. See Butler v. State Bar of Cal., 721 P.2d 585 (Cal. 1986). In Butler, the Court stated “while an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation.” Id. at 588. Butler, involved an estate administration where the personal representative informed the attorney that the estate had only non-probate assets. Id. at 586. Based on that information the attorney stated a probate proceeding was not necessary. Id. at 586-87. In review of the State Bar of California’s recommendation for suspension, the Court found the attorney failed to make adequate inquiry, failed to obtain relevant information to probate the estate and failed to communicate adequately with the beneficiary. Id. at 588-89.
2. Prepare and Review

Once the information is obtained, the estate-planning attorney has a duty to draft a valid testamentary document that accurately reflects the testator's intent. This duty includes an obligation to clarify any uncertainties in the client-provided information, explain tax and non-tax ramifications of the testator's wishes, and draft the document in accordance with statutory formalities and/or legal requirements. On occasion, courts impose a duty to examine potential tax problems. In most instances, the court's reluctance to incorporate tax-incentive provisions hinges on the need to honor the testator's testamentary scheme that is changed when tax provisions are incorporated into the testamentary document. For example, objectively, most clients take advantage of the Federal exemption amount by placing that amount in a credit shelter trust, and making a

96. See supra n. 5 (discussing the importance of the testator's intent).
97. Horne v. Peckham, 158 Cal. Rptr. 714, 720 (App. 3d Dist. 1979) (stating that the general practitioner has a duty to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so).
98. See Dobris, supra n. 2 (explaining that the testamentary document must satisfy the requirements of the jurisdiction in which the decedent is domiciled as of his or her date of death); but see Md. Ests. & Trust Code Ann. § 4-104(3) (1974) (discussing that savings statutes recognize the testamentary document as being valid provided the document is valid in the jurisdiction in which it was executed).
99. See Dobris, supra n. 2, at 473-490 (explaining that a valid trust requires ascertainable beneficiary, present intent, legal purpose, and resolution).
100. Bucquet v. Livingston, 129 Cal. Rptr. 514, 518-21 (App. 1st Dist. 1976) (holding that knowledge of potential tax problems inherent in general powers of appointment in a trust were within the ambit of a reasonably competent and diligent practitioner); see also Horne, 158 Cal. Rptr. at 720 (holding that a general practitioner who acknowledged needing expert assistance regarding tax consequences of the trust had the duty to "refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so); but see Barner v. Sheldon, 678 A.2d 767 (N.J. Super. L.1995) (holding that an attorney who drafted the will and who was subsequently appointed as attorney for estate by executrix did not owe duty to inform beneficiaries (testator's children) that they had right to disclaim their share of testator's estate in favor of their mother, which allegedly would have resulted in avoidance or diminution of Federal estate taxes).
101. See I.R.C. §§ 2010, 2056 (West 2004) (noting that the most common tax-incentive provision is the married testator's ability to employ basic Federal estate tax savings provisions with a credit shelter trust and unlimited marital deduction, which results in the elimination Federal estate taxes on the death of the first spouse).
conscious decision to engage in such tax planning.\textsuperscript{102} If done, the surviving spouse is prevented from having control over the trust assets. Thus, the surviving spouse is much more limited than he or she would be with an outright distribution. Therefore, courts will not infer the attorney’s negligence from the testator’s failure to engage in this level of tax estate planning.\textsuperscript{103} The possibility of a valid reason for not using the credit shelter trust, precludes the court from presuming its absence is due to the preparer’s negligence.

Following the drafting of the testamentary document, the attorney has an obligation to review the document to insure its validity\textsuperscript{104} and complies with the testator’s wishes.\textsuperscript{105} At some point in the process before execution, documents should be carefully and thoroughly reviewed by the attorney for patent defects. Although a patent defect could be discovered by the client prior to the document’s execution, the client’s failure to bring an obvious defect to the attorney’s attention should not prevent his or her malpractice recovery.\textsuperscript{106} To impose this responsibility on the client would be improper and unfair. Thus, the client’s failure to discover and notify the attorney of the patent defect does not make the client contributorily negligent.\textsuperscript{107}

The attorney owes duties to his or her client.\textsuperscript{108} The discovery by the client of the attorney’s failure to provide this standard of care would result in a breach and damages.\textsuperscript{109} In this instance damages will likely be limited to the refund of fees.\textsuperscript{110} More often, the error is

\textsuperscript{102} I.R.C. § 2010.

\textsuperscript{103} Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (stating that testators do not always intend to avoid taxes, and in order to do so, the testator’s must part with dominion and control).

\textsuperscript{104} But see Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961) (holding that drafting a will so that the trust provisions violated the rule against perpetuities did not amount to negligence).

\textsuperscript{105} See infra pt. IV.A. (discussing cases where third parties claim the document in some way failed to comply with the testator’s wishes).

\textsuperscript{106} Knupp v. Schoeber, 1992 WL 182323 at **2-4 (D.C. July 14, 1992) (holding that where a third party is able to proceed against the negligent attorney, contributory negligence should not mitigate damages).

\textsuperscript{107} Id.

\textsuperscript{108} See supra n. 69 (discussing the establishment of an attorney-client relationship and the respective duties and responsibilities).

\textsuperscript{109} Fogel, supra n. 19, at 278.

\textsuperscript{110} Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (stating in dicta that the attorney could correct the will without further compensation or refund his or her fee).
discovered at the client’s death and because of the testator’s absence, courts are reluctant to second guess the testamentary intent and impose unclear obligations on the attorney. But the existence of a patent ambiguity is a defect that should have been corrected and could have been eliminated at this stage of the estate-planning process. The attorney’s failure to render competent services at the preparation and review stage causes the harm.

3. Execution

The attorney should be involved in the execution of the testamentary documents so that the attorney has another opportunity to discover a patent ambiguity. A draft forwarded to the client without an appropriate explanation of the necessary execution procedures could result in a malpractice action. Often, inadequacies in the execution ceremony lead to an invalid will. The attorney must supervise or adequately inform the client with respect to execution procedures. These procedures include instructions regarding signature, witnessing, and safekeeping. Although the execution ceremony seems straightforward, many problems arise due to inadequate supervision.

111. Id. at 1266 (finding that, where a Federal tax exemption was not maximized as part of the client’s testamentary wishes, testators do not always intend to avoid taxes because doing so requires the testator to part with dominion and control).


113. See In re Alleged Will of Ranney, 589 A.2d 1339, 1346 (N.J. 1991) (finding that the testator’s failure to comply with the statutory formalities of signing in the presence of the two witnesses resulted in his property passing intestate).

114. But see Atty. Grievance Commn. v. Myers, 490 A.2d 231, 233 (Md. 1983) (illustrating that under certain circumstances an attorney may reasonably believe that the client is sufficiently sophisticated and reliable to follow her instructions. An attorney prepared a will without an attestation clause, without signature lines, and failed to instruct the client properly regarding the manner of execution.).

115. See e.g. Tomkins v. Beckley, 1999 WL 141328 at *3 (Mar. 9, 1999) (discussing whether an attorney breached his duty where a will was never formally executed); Auric v. Contl. Cas. Co., 331 N.W. 2d 325, 327 (Wis. 1983) (finding that the attorney’s negligence in his supervision of the execution of the will caused damages to the beneficiaries where a will was invalid for failure to have the required number of
The courts tend to find attorney’s negligence for flaws in the statutory formalities. In such a situation, if the jurisdiction does not fix the invalid will with substantial compliance, the attorney will likely be liable. Similar to the situation of a testamentary document’s failure to comply with statutory formalities, when a patent ambiguity exists, the attorney should be liable for the consequences of this level of intolerable carelessness.

4. Implementation

After the testamentary document is signed, a will is funded on the testator’s death, whereas a revocable trust is funded during the settlor’s lifetime with the transfer of property to the trustee. Some documents of transfer, like a deed, must be prepared by an attorney. Other assets, like bank accounts and brokerage accounts, may be transferred without any assistance. The attorney should, at a minimum, advise the client on the procedures necessary to implement the trust. The failure to implement the trust during the settlor’s lifetime is oftentimes the result of the attorney’s failure to comply with his or her duties in rendering estate planning services. But when the attorney’s failure to implement the living trust is discovered at the death of the settlor, the courts are hesitant to presume that the lack of implementation was the attorney’s fault. Instead, due to the number of potential reasons for the settlor’s failure to implement, a court is likely to justify it due to the possibility that the settlor had second thoughts.

signatures).

119. For example, opening accounts in the name of the trust by filling out the account application, followed by letters of instruction from the client is sufficient to accomplish this task. George T. Bogert, Trusts § 32 (6th ed., West 2001).
120. See e.g. Fla. B. v. Schramek, 616 So. 2d 979, 987 (Fla. 1993) (finding that a non-lawyer’s failure to implement a living trust forced the decedent’s heirs to probate her estate).
121. See Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) (justifying the defeat of a testatrix’s pour-over will where there was a defective trust because of the “concomitant questions as to the true intentions of the testator”).
B. **COMPETENT REPRESENTATION AMOUNTS TO A DUTY TO DRAFT TESTAMENTARY DOCUMENTS FREE FROM PATENT AMBIGUITIES**

The Model Rules of Professional Conduct require an attorney to provide his or her client with competent representation.\(^{122}\) This Ethical Rule requires the attorney to demonstrate "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."\(^{123}\) The mere existence of a patent ambiguity in a testamentary document reflects an obvious lack of due care and departure from competent representation.\(^{124}\) The patent ambiguity should not exist and would not exist had the attorney rendered competent services. Clients have a right to expect competence in the preparation of their testamentary documents. If it is discovered that the legal services rendered fell beneath this required standard of care, clients have recourse against the attorney. Although a violation of this Ethical Rule does not in and of itself give rise to a cause of action for negligence nor was it designed to be a basis for civil liability, the violation "may be evidence of breach."\(^{125}\)

1. **Permitted Inference of Negligence Due to the Existence of Patent Ambiguity**

This article proposes that the existence of a patent ambiguity violates Ethical Rule 1.1,\(^{126}\) and from such violation, a permitted inference of negligence should be drawn.\(^{127}\) The mere existence of a patent ambiguity in a testamentary document allows for an inference of the preparer's negligence.\(^{128}\) The permitted inference should be allowed because the patent ambiguity could and should have been easily avoided with appropriate drafting steps and procedures.\(^{129}\)

\(^{122}\) Model R. of Prof. Conduct 1.1 (ABA 2004) (requiring a lawyer to provide clients competent representation, defined as the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation).

\(^{123}\) Id.

\(^{124}\) *Infra* pt. III.B.1. (discussing the permitted inference of negligence).

\(^{125}\) See Gillers & Simon, supra n. 16, at 113.

\(^{126}\) Model R. of Prof. Conduct 1.1 (ABA 2004).

\(^{127}\) Michael H. Graham, *Handbook of Federal Evidence* § 301.7 (5th ed., West 2001); McLain, Maryland Evidence § 301:4 (defining permissible inferences as allowing upon the proof of a basic fact, a second fact to be inferred).

\(^{128}\) Graham, supra n. 127, at § 301.7; McLain, supra n. 127, at § 301:4.

\(^{129}\) Dukeminier & Johanson, supra n. 10, at 409.
patent error could and should have been discovered in the preparation and review stage of the estate-planning process.\textsuperscript{130} For example, if the will provision specifically bequeathed real property but failed to designate the beneficiary, this error should have been caught during the appropriate review of the will. The client's foreseeable absence and inability to participate in the action, coupled with the need to provide a remedy, mandate this permitted inference.

IV. THIRD PARTY CAUSE OF ACTION FOR NEGLIGENCE

A. JUSTIFICATIONS FOR EXTENDING ATTORNEY'S DUTY TO THIRD PARTIES

Current law does not automatically extend the attorney's duty to draft testamentary documents free from patent ambiguities to third parties. However, in order to provide an adequate remedy to those harmed, this duty must be extended. This extension is necessary because the attorney's failure to render competent services is likely to be discovered only after the client's death, which terminates the attorney-client relationship and the duties attached therewith. Like the bad conduct exception,\textsuperscript{131} the existence of a patent ambiguity opens the door for third party suits. The attorney's gross carelessness that resulted in a patent ambiguity should permit the third party to proceed. Baseless claims can be controlled by requiring the third party to show harm with extrinsic evidence.

B. ACCOUNTABILITY TO THIRD PARTIES

If the document includes a patent ambiguity, the client's absence presents a unique hurdle for those harmed by the defective drafting. Third parties are left to determine whether they can sue, justifying the risks of litigation and funding the suit. Whether a third party can successfully bring a cause of action against the attorney who prepared the testamentary document with a patent defect depends on the jurisdiction.

Current approaches to third party liability in the preparation of testamentary documents are insufficient and fail to provide a remedy to

\textsuperscript{130} See supra pt. III.A.2. (discussing the attorney's duty of care in the preparation and review stages of the estate-planning process).

\textsuperscript{131} See infra pt. IV.B.2.a. (defining and describing of the bad conduct exception).
the third party harmed by the patent ambiguity.\textsuperscript{132} This article classifies those approaches as strict privity,\textsuperscript{133} strict privity exceptions,\textsuperscript{134} or other approaches.\textsuperscript{135} The third party’s inability to sue in jurisdictions adhering to the strict privity rule amounts to absolute immunity. Several jurisdictions require the third party to satisfy a strict privity exception, which offers little practical relief. The majority of states have adopted other approaches that allow the third party to sue but only after he or she satisfies a sufficient number of elements under the balancing of factors test\textsuperscript{136} or proves that he or she is a foreseeable plaintiff who relied upon the services under the foreseeable reliance theory.\textsuperscript{137} When the attorney’s negligence results in a patent ambiguity, these approaches unnecessarily impose significant burdens and costs on the third party.

1. \textit{Strict Privity}

Over one hundred years ago, the United States Supreme Court held that a third party not in privity\textsuperscript{138} with an attorney had no cause of action against the attorney for negligence.\textsuperscript{139} The Court stated that absent privity, the attorney would be exposed to countless claims\textsuperscript{140} and would be unable to zealously represent his or her clients.

Although most jurisdictions no longer follow strict privity, a minority of jurisdictions,\textsuperscript{141} despite its inequities,\textsuperscript{142} adhere to strict

\textsuperscript{132} See infra pt. IV.B. (discussing the current approaches to accountability to third parties).
\textsuperscript{133} See infra pt. IV.B.1.
\textsuperscript{134} See infra pt. IV.B.2.
\textsuperscript{135} See infra pt. IV.B.3.
\textsuperscript{136} See infra pt. IV.B.3.a.
\textsuperscript{137} See infra pt. IV.B.3.b.
\textsuperscript{138} Black's Law Dictionary at 1237 (defining privity as “the connection or relationship between two parties, each having a legally recognized interest in the same subject matter”).
\textsuperscript{139} Natl. Sav. Bank of D.C. v. Ward, 100 U.S. 195, 200 (1879) (finding that, due to the lack of privity, a lender could not bring a negligence cause of action against an attorney who was acting on behalf of the real estate loan applicant).
\textsuperscript{140} Id. at 202.
\textsuperscript{141} See e.g. Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002) (upholding the rule that a third party cannot sue an attorney without privity, despite the attorney’s admission of fault in failing to destroy a previous will upon the request of his client); Linck v. Barokas & Martin, 667 P.2d 171, 173 (Ala. 1983) (dismissing complaint of professional negligence against attorneys brought by deceased widow); Lilyhorn v.
privity in the situation of estate-planning malpractice.\textsuperscript{143} Strict privity acts as an absolute bar to the cause of action and constitutes immunity for estate-planning attorneys when the defect is discovered after the testator’s death. Adherence to such a principle in the words of an English court is striking, because the real harm is caused when “the only person who has a valid claim has suffered no loss and the only person who has suffered a loss has no valid claim.”\textsuperscript{144}

a. Justifications for Strict Privity

Proponents of strict privity believe that a greater good is being served by preserving the attorney’s ability to zealously represent clients without being compromised by the threat of a suit from third parties.\textsuperscript{145} In those states following strict privity, it is believed strict privity is

---

\textsuperscript{142} See infra pt. IV.B.1.b.

\textsuperscript{143} Robinson, 842 So.2d at 637.

\textsuperscript{144} Ross \textit{v. Caunters}, 3 All Eng. Reports 580, 583 (Chancery Div. 1979) (holding that the beneficiaries’ lack of privity of contract with the attorney-drafter of the will was no bar to an action for negligence). The English court observed:

\[ \text{In broad terms, the question is whether solicitors who prepare a will are liable to a beneficiary under it if, through their negligence, the gift to the beneficiary is void. The solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her. If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim.}\]

\textit{Id.}

\textsuperscript{145} Barcelo, 923 S.W.2d at 577-579 (The court stated that an attorney retained by a testator to draft a trust owed no professional duty of care to persons named as beneficiaries thus barring a malpractice suit when the trust was declared invalid. The court reasoned that without this privity barrier, clients would lose control over the attorney-client relationship and attorneys would be subject to unlimited liability.).
necessary to: (1) Prevent frivolous claims by beneficiaries who did not benefit under the will as they believed they should, (2) protect the attorney-client relationship, (3) prevent the attorney from dividing his loyalties between the client and intended beneficiary,146 (4) prevent the drafting-attorney from being subject to unlimited liability,147 (5) prevent a conflict of interest during the estate-planning process that would limit the attorney’s ability to represent the client zealously,148 and (6) protect the deceased testator’s intentions rather than allowing beneficiaries to doubt them.149 Strict privity supporters believe that “in drafting testamentary instruments at the behest of a client, an attorney should not be burdened with potential liability to possible beneficiaries of such instruments.”150

b. Inequities of Strict Privity

These public policy arguments favoring strict privity fail to address the detrimental impact such a rule has on the third party who is left without recourse to pursue his or her remedy. Strict privity operates as an absolute bar regardless of the facts and circumstances. This harsh rule allows carelessness to occur and continue to occur in the preparation of testamentary documents because when the patent defect is discovered after the testator’s death there is no risk of malpractice.151 In states following strict privity, there is no accountability for sloppy and careless drafting. Without accountability

146. Craig D. Martin, Student Author, Liability of Attorneys to Non-Clients: When Does a Duty to Non-Clients Arise?, 23 J. Leg. Prof. 273, 279 (1999) (noting that enacting an exception to the strict privity requirement “would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney’s loyalty between his or her client and the third-party beneficiaries.”).

147. Barcelo, 923 S.W.2d at 577.

148. Id. at 578.

149. Id. at 577-78; Martin, supra n. 146, at 279.

150. Glover v. Southard, 894 P.2d 21, 25 (Colo. App. Div. 2 1994) (holding that a bank’s attorney, who drafted a trust agreement for the decedent and later amended the testator’s will to leave the entire estate to the beneficiaries, but never amended the trust, had no duty to the beneficiaries).

151. See generally id. (illustrating strict privity jurisdictions tendency to make negligent estate planners immune from liability when the negligence is discovered after the death of his or her client).
to third parties, attorneys will not clean up practices or prevent future harm.

Despite the justification for strict privity, adherence to such a rule in the estate-planning area has a detrimental affect on third parties and therefore should not be followed. Most jurisdictions agree and have developed exceptions or other rules to provide third parties with an avenue for pursuing a remedy.

2. **Strict Privity Exceptions**

Some jurisdictions have softened the consequences of strict privity by making narrow strict privity exceptions for defective testamentary documents. This article divides the strict privity exceptions into three groups: (1) The bad conduct exception, (2) the third-party beneficiary exception, and (3) the frustrated intent exception.

152. See supra pt. IV.B.1.a.
153. See infra pt. IV.B.2. (discussing strict privity exceptions).
154. See infra pt. IV.B.3. (discussing other approaches developed to accommodate third parties).
155. E.g. *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (holding that the requirement of privity did not extend to a malpractice suit brought by the intended beneficiary of a will against the attorneys who drafted it); *Simpson v. Calivas*, 650 A.2d 318, 322 (N.H. 1994) (holding that although there was no privity between a drafting lawyer and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demanded an exception to the privity rule); *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987) (stating that generally, an attorney is immune from liability to third persons unless that attorney acted maliciously).
156. E.g. *McDonald v. Pettus*, 988 S.W.2d 9, 14 (Ark. 1999) (indicating that one exception to the lawyer-immunity statute includes any statement by the attorney that constitutes fraud); accord *Zipperstein*, 512 N.E.2d at 638; *Brooks v. Zebre*, 792 P.2d 196, 201-202 (Wyo. 1990).
157. E.g. *Walker v. Lawson*, 514 N.E.2d 629, 633 (Ind. App. 1987) (attorney who drafts a will owes a fiduciary duty to the beneficiary because ordinary principles of negligence apply in a cause of action for malpractice for the known intended beneficiaries of a testamentary scheme); *Pizel v. Zuspann*, 795 P.2d 42, 48 (Kan. 1990) (holding that the appellant was entitled to bring suit as there was no dispute that appellant was a foreseeable beneficiary to the trust); *Killingsworth v. Schlater*, 292 So. 2d 536, 543 (La. 1973) (finding that the legatees were entitled to recover damages as third-party beneficiaries for breach of the attorney’s stipulation to legally draft the will); *Noble v. Bruce*, 709 A.2d 1264, 1272 (Md. 1998) (requiring plaintiff to prove direct employment relationship or that he or she was the intended third-party beneficiary under the narrow exception to the strict privity requirement); *Calivas*, 650 A.2d at 322 (holding that “although there [was] no privity between a drafting attorney...
a. Bad Conduct Exception

Courts willingly deviate from strict privity when the attorney's conduct is fraudulent, malicious,¹⁵⁹ or improper.¹⁶⁰ Exceptions to strict privity are also made for collusion,¹⁶¹ and intentional...
misrepresentation. This article has designated these situations as the "bad conduct exception" because they involve inexcusable conduct by the attorney. The bad conduct exception only provides third parties with an avenue for recovery when the third party was a victim of the attorney's bad behavior. Thus, the bad conduct exception rewards third parties while punishing the attorney for his or her actions. The bad conduct exception is aimed at deterring bad conduct and echoes the view that such conduct should not and will not be tolerated. Thus, by engaging in bad conduct, the attorney extends his or her duty of care to the third party. The bad conduct exception requires an intentional component to the attorney's actions or inactions that is absent when a patent ambiguity is at issue.

This article's proposal is consistent with the theory of third party accountability used for the bad conduct exception. Like the bad conduct exception, when an attorney's negligence escalates to the level that results in a testamentary document that is prepared with a patent defect, third parties should be provided with an avenue to pursue recovery. It is only with this level of accountability that future harm will be deterred.

b. Third-Party Beneficiary Exception

When the third party can show that he or she was closely connected to the services rendered, jurisdictions are willing to extend the duty of care to those third parties. Jurisdictions justify this exception with a variety of terms referring to the third party as the

---

162. See generally Ark. Code Ann. § 16-22-310 (defining intentional misrepresentation as a false representation of a matter of fact that deceives and is intended to deceive another so that he or she acts upon it to his or her legal injury).
163. Donahue v. Shughart, 900 S.W.2d 624, 628 (Mo. 1995) (finding that the pleadings were sufficient to establish that attorneys owed a duty to non-clients who were intended recipients of client's gifts causa mortis and supported a legal malpractice action by the non-clients against the attorneys).
164. Although a patent ambiguity could result from an intentional act, such as the attorney's deliberate failure to designate an intended beneficiary, that situation is beyond the scope of this discussion.
165. Many courts use the term third-party beneficiary in their analysis of the privity cases. The classification of this strict privity exception does not mirror that discussion. See infra pt. IV.B.3.a. (discussing the elements of the balancing of factors test).
166. Supra n. 157 (discussing cases following third-party beneficiary exception).
“identified beneficiary”167 or requiring the third party to establish he or she was the “direct purpose of the estate planning transaction.”168 By requiring the third party to establish this sufficient connection to the services rendered, the likelihood of frivolous suits is lessened.169 However, by imposing such requirements, the third party harmed by the patent ambiguity is oftentimes no better served. For example, a third party harmed by a will with a patent ambiguity that fails to identify that third party will be unable to satisfy this exception.170 In the situation of non-identified property,171 or duplication,172 the third party faces a significant burden in order to satisfy the third party beneficiary exception because courts have created a patchwork of rules and terms,173 with little uniformity.174 This patchwork of law and


168. Noble v. Bruce, 709 A.2d 1264, 1272 (Md. 1998) (holding that the client’s intent to benefit the non-client must be a direct purpose of the transaction or the attorney-client relationship in order for the non-client to be considered a third-party beneficiary).

169. See Martin, supra n. 146, at 279 (discussing that if an exception to the strict privity requirement is enacted, additional requirements on third parties would be necessary to prevent frivolous suits).

170. See Knupp v. D.C., 578 A.2d 702, 703, 705 (D.C. 1990) In Knupp, the patent ambiguity was a disposition of the residual estate to the person designated in the eighth paragraph of the will. Paragraph eight made a personal representative appointment and did not refer to the disposition of the testator’s residual estate. The appointed personal representative was the person who claimed harm as a result of the patent defect but he would not have been able to satisfy the third-party exception because he was not an identified beneficiary. Id. at 703.

171. Wilson v. First Florida Bank, 498 So. 2d 1289, 1291 (Fla. 2d Dist. App. 1986).

172. Succession of Neff, 716 So. 2d 410, 410-411 (La. App. 4th Cir. 1998).

173. See Needham v. Hamilton, 459 A.2d 1060, 1062-63 (D.C. 1983) (requiring the third party to be the “direct and intended” beneficiary of the attorney-client relationship). See Pizel v. Zuspann, 795 P.2d 42, 49 (Kan. 1990) (requiring the third party claimant to be a “foreseeable” third party); Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985) (establishing the rule that third party recovery in an attorney malpractice case is whether the intent of the client to benefit the third party actually existed, not whether the client could have intended to benefit third party); Simpson v. Calivas, 650 A.2d 318, 321 (N.H. 1994) (referencing this exception as an “intended” beneficiary).

174. See In re Sandersfeld Estate, 9 Cal. Rptr. 447 (App. 4th Dist. 1960) (holding that the meaning of the word “home” was a latent ambiguity and allowed extrinsic evidence); see also Carlisle v. Est. of Carlisle, 252 So. 2d 894, 895 (Miss. 1971) (admitting extrinsic evidence even though that the uncertainty of the word “home” was labeled a patent ambiguity).
terms further adds to the difficulties faced by the third party in bringing suit under this exception.

c. Frustrated Intent Exception

Other jurisdictions have carved out a narrow exception for patent defects if the error contradicts the testator’s expressed intent. This exception is sometimes referred to as the “Florida-Iowa exception,” deviates from strict privity when the testamentary intent as “expressed in the testamentary instruments” is frustrated. This rule most often applies where there are errors in the execution of the testamentary document. For example, in order for this exception to provide an avenue for recovery to a third party harmed by a patent ambiguity, the testamentary document would require a statement such as “I intend to benefit my daughter,” followed by a legacy with no designated beneficiary. It is difficult to imagine why an attorney who would be careless enough to prepare a testamentary document with a patent ambiguity would incorporate non-required direct statements of intent. Thus, this exception will not likely provide the third party with recourse when the defective document includes a patent ambiguity.

When the testamentary document is patently defective, the strict privity exceptions are insufficient and unlikely to adequately protect third parties harmed by an attorney’s carelessness. Not one case that

175. Fogel, supra n. 19, at 262-263 (discussing the Florida-Iowa rule allowing a beneficiary to maintain a cause of action against the estate-planning attorney only if the client’s intent, as expressed in the will or other document, is frustrated).

176. See Harrigfeld v. Hancock, 364 F.3d 1024, 1024 (9th Cir. 2004) (holding that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator, to have them properly executed so as to effectuate the testator’s intent as expressed in the testamentary instruments).

177. Fogel, supra n. 19, at 333 (discussing the types of errors more likely to satisfy this exception).


179. See e.g. Glover v. Southard, 894 P.2d 21, 24-25 (Colo. App. Div. 2 1994) (deciding that attorney who drafted decedent’s will and trust owed no duty to intended beneficiaries and, thus, beneficiaries could not assert legal malpractice claim based on alleged failure to amend gift provisions of will in accordance with amendments made to trust); Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. 1983) (finding that “the
applied these narrow exceptions involved a patent ambiguity. This suggests that third parties harmed by a patent defect have no greater chance to recover under the strict privity exceptions than they have under strict privity.

3. Other Approaches Developed to Accommodate Third Parties

a. Balancing of Factors Test

A majority of jurisdictions have abandoned strict privity and strict privity exceptions for the “balancing of factors” test. This test considers a number of criteria in determining whether a duty is owed by the attorney to a third party. The California Supreme Court developed this test and was the first to deviate from the inequitable consequences of strict privity. The factors to be considered are: (1) The extent to which the transaction was intended to affect the plaintiff, interests of the testatrix and the intended beneficiary with regard to the proper drafting and execution of the will were the same”); Noble v. Bruce, 709 A.2d 1264, 1276 (Md. 1998) (stating that the non-client must allege and prove that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship. In this situation, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.); but see Donahue v. Shughart, 900 S.W.2d 624, 628 (Mo. 1995) (finding that under a third-party beneficiary theory it is difficult to conceive of a situation where the lawyer will be held liable for a failed gift or testamentary transfer while the client is still living and competent).

180. Fogel, supra n. 19, at 283-293 (discussing the Florida-Iowa Rule and cases where this exception failed).


182. Biakanja, 320 P.2d at 17, 19 (finding that where a notary public prepared an invalid will and caused the sole beneficiary named in the will to receive only one-eighth of the estate by intestate succession, the notary public had a duty to exercise due care to protect sole beneficiary from injury and her negligence was the direct cause of beneficiary’s loss).
(2) the foreseeability of the harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the attorney’s conduct and the injury suffered, (5) the moral blame attached to the attorney’s conduct, and (6) the policy of preventing future harm. Several years later, the California court, in *Lucas v. Hamm*, applied these factors to an attorney malpractice case involving a negligence cause of action brought by will beneficiaries against the drafting attorney. In *Lucas*, the Court added an additional factor, which recognized that liability in such cases would not impose an undue burden on the legal profession. In its justification for changing California’s law, the Court recognized that without extending an attorney’s duty of care to third parties in the estate-planning setting “no one would [ever] be able to recover.”

In recent years, other states have recognized the need to expand from strict privity or strict privity exceptions allowing third parties to sue attorneys in malpractice. In reaching their decision, the courts

183. *Id.* at 19.

184. *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (holding that the lack of privity between the beneficiaries of a will and the attorney drafting the will did not preclude the beneficiaries from maintaining an action in tort for negligence in drafting the will because the extension of liability in the estate-planning setting would not be unduly burdensome).

185. *Id.*

186. *Id.* (finding that the relationship between the testator and the attorney was to provide the testator with a means by which he could transfer property to beneficiaries. If the testator’s intent is frustrated due to negligent drafting by the attorney, and the intended beneficiaries are not able to maintain a cause of action, no one would be able to recover.).

187. See *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965, 967 (Ariz. App. Div. 2, 2002). In *Fleming*, the court recognized public policy concerns and the importance of allowing the balancing of factors to determine whether or not an attorney was liable to an individual not in privity with him. *Id.* The Arizona courts balance the California factors which are: “(1) [T]he extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant’s conduct and the injuries suffered, (5) the moral blame attached to the defendant’s conduct, and (6) the policy of preventing future harm.” *Id.; Donahue v. Shughart*, 900 S.W. 2d 624, 629 (Mo. 1995) In *Donahue*, the court recognized the California test and acknowledged in Missouri there was no case law in which a third-party beneficiary had a cause of action against the attorney for negligence. The court then outlined the factors to be considered: “(1) [T]he existence of a specific intent by the client that the purpose of the attorney’s services were to benefit the plaintiffs, (2) the foreseeability of the harm to the plaintiffs as a result of the attorney’s negligence, (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct, (4) the
also evaluated the language set forth in section 51(3) of the Restatement of the Law Governing Lawyers, which states that

[a] lawyer owes a duty of care . . . to a third party when and to the extent that: (a) The lawyer knows that a client intends, as one of the primary objectives of the representation, the lawyer's services to benefit the third party; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.188

Although public policy warrants a departure from the harsh consequences of strict privity, the balancing of factors test is not without substantial cost to the injured third party.189 This test requires the third party to make a case within a case to recover from the attorney. First, the third party is required to prove he or she is entitled to bring the cause of action by satisfying a sufficient number of elements under this test. If successful, the third party may proceed with the malpractice action. Unfortunately, the series of factors examined by the various courts have not been consistently applied amongst jurisdictions,190 and the third party faces a gamble, at best, in addressing the laundry list of factors that are subject to change.191 Although it is apparent that courts are striving for equitable outcomes in their consideration of facts and circumstances, the third party is forced to absorb the risks, burdens and significant costs associated with bringing the cause of action.192

closeness of the connection between the attorney's conduct and the injury, (5) the policy of preventing future harm, and (6) the burden on the profession of recognizing liability under the circumstances.” Id.


189. Auric v. Contl. Cas. Co., 331 N.W. 2d 325, 328 (Wis. 1983) (stating that there is a constitutional right to execute a will and have it carried out according to the testator's intentions, and by allowing an intended beneficiary to bring a cause of action against the attorney, the attorney will be held accountable for his actions).

190. Supra n. 187 (discussing two cases where the California factors are not applied identically).

191. See Lucas v. Hamm, 364 P.2d 685, 686 (Cal. 1961) (including an additional factor to be considered).

192. Attorney's fees and costs of litigation are significant and will be necessarily absorbed by the third party bringing the cause of action.
It should not be necessary for a third party to face these hurdles when a patent ambiguity is at issue. The third party should not be required to bring a cause of action which could be financially draining and physically exhausting. These burdens in and of themselves sufficiently discourage such causes of action and amount to a waste of judicial resources. Instead, because of the existence of a patent ambiguity, the attorney should be held accountable for his or her obvious error and the foreseeable harm.

b. Foreseeable Reliance Theory

In some states, the basis for determining an attorney's liability to a third party under the balancing of factors test is deemed too broad and risks great interference with the attorney-client relationship. In response, several jurisdictions have established an alternate theory known as the foreseeable reliance theory. This theory relaxes the harsh consequences of strict privity, allowing third party liability on a more limited scale. The foreseeable reliance theory states that an attorney owes a duty to a third party if it is foreseeable that the third party will rely on the specific services rendered by that attorney.

193. Since the attorney and/or his or her insurance carrier (herein defendants) will be required to make the third party whole, the defendants will likely expend exorbitant amounts to preclude recovery. This is especially true because damages will oftentimes depend on the size of the estate.

194. This article is not advocating for damages greater than what the third party would have received had the defect not occurred. See Dobbs, supra n. 21 (defining compensatory damages).

195. See e.g. Tom W. Bell, Student Author, Limits on the Privity and Assignment of Legal Malpractice Claims, 59 U. Chi. L. Rev. 1533, 1538 (1992). 

196. See e.g. Licata v. Spector, 225 A.2d 28, 9-30 (1966) (holding that "liability for a negligent performance of a contract ... should be imposed where the injury to the plaintiff is foreseeable and where the contract is an incident to an enterprise of the ... [attorney] and there are adequate [policy] reasons for imposing a duty of care"); see Williams v. Ely, 668 N.E.2d 799, 805 (1996) (finding that "an attorney may [be held to] owe a duty to [third parties] who the attorney knows will rely on the services rendered"); Harper v. Harsh, 1992 Tenn. App. LEXIS 121, *4 (Feb. 7, 1992) (holding an attorney "liable to a ... third party who is known by him to be relying upon his proper preparation of a document affecting vested rights of the third party").

197. Williams, 668 N.E.2d at 805.
these jurisdictions an attorney has a duty not only to his client for whom the testamentary documents are being prepared, but also to the foreseeable third parties who will rely on those services. The foreseeable reliance theory requires the third party to prove reliance, which is oftentimes a difficult task. In order for this exception to apply, the third party would need to be involved in the client’s estate-planning process. This would impose an obligation on the client to make the third party aware of the document’s contents prior to his or her death and put the attorney on notice of the third party’s knowledge. This presents a problem when the client desires to keep his or her will contents private until his or her death.

Under this theory, one court held that an attorney advising a client owes no duty to third persons affected by that advice "in the absence of a showing that the legal advice was foreseeably transmitted to or relied upon by plaintiffs." The use of the theory by a third party is further complicated by the courts’ interpretation of whether the attorney’s actual knowledge of the third party’s reliance is required. One court found that actual knowledge was not required so long as the average lawyer could foresee such reliance. Similar to the proposal made by this article, the impact on the attorney-client relationship and the attorney’s ability to provide zealous representation are necessarily compromised for the greater good of providing the needed protection to third parties harmed by the patent ambiguity.

When the patent ambiguity is an unidentified beneficiary, this theory offers no recourse for the third party. Moreover, for all patent defects under this theory, third parties will have a difficult time proving reliance unless he or she was actively engaged in the client’s estate-

199. Dobris, supra n. 2 (differentiating a will, which becomes public record when offered for probate, and a revocable trust, which does not become public unless it becomes part of litigation).
200. Goodman v. Kennedy, 556 P.2d 737, 743 (1976). The Goodman court also explained that, “To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance [on that advice] but also to the other parties to the transaction with whom the client deals at arm’s length would inject undesirable self-protective reservations into the attorney’s [counseling] role,” and would result both in an “undue burden upon the profession and a diminution in the quality of the legal services received by the client.” Id. at 739.
202. See supra n. 148 and accompanying text (5) (discussing the conflict of interest to justify application of the strict privity rule).
planning process. Requiring the third party’s participation in the client’s estate-planning process imposes significant obligations on the client, which may be undesirable and unknown.\textsuperscript{203}

Other approaches to resolving patent ambiguity when a third party’s interests are at stake have proved inadequate. They place financial burden and risk of litigation on the third party, and thereby, make a successful malpractice action unlikely. The third party who suffers damages as a result of a testamentary document prepared with a patent ambiguity warrants real protection to recover for his or her harm. Protection can only be achieved by mandating compensation from the attorney whose carelessness caused the harm. Without such protections, this degree of negligence will not be curtailed or deterred, and will continue.

When a testamentary document is prepared with a patent defect, the preparer should be accountable to the third party harmed by the ambiguity. When the attorney’s standard of care falls significantly beneath the client’s reasonable expectation of competent representation, such as when a patent ambiguity exists in a will or trust, then the attorney’s duty should automatically extend beyond the client to those harmed by the patent defect. Similar to the bad conduct exception, a third party who can show harm with extrinsic evidence should be given an avenue for recovery.\textsuperscript{204} Negligence to this degree is easily avoided with appropriate standards and procedures during the estate-planning process and should not be tolerated.

V. DETER FUTURE HARM WITH THE AID OF EXTRINSIC EVIDENCE

This article proposes the mere existence of a patent ambiguity in a testamentary document gives rise to an inference of negligence and is sufficient to allow an injured third party to proceed against the attorney in a malpractice action.\textsuperscript{205} Having alleged harm supported by reliable extrinsic evidence, damages are determined based on what the third party would have received had the patent defect not occurred.\textsuperscript{206} This proposal is intended to make it easier and more cost effective for third

\textsuperscript{203} The client may not be advised by the attorney of the third party’s required participation in his or her estate-planning process.
\textsuperscript{204} See supra pt. IV.B.2.a.
\textsuperscript{205} McLain, supra n. 127, at § 301:4 (explaining that the inference of negligence resulting from a patent ambiguity may also be termed “prima facie evidence”).
\textsuperscript{206} See Dobbs, supra n. 21 (defining compensatory damages).
parties harmed by the patent defect to sue the attorney in malpractice.\textsuperscript{207} To deter the gross carelessness, which allowed the testamentary document to be prepared with a patent ambiguity, the law must allow the injured third party to proceed against the responsible attorney without the senseless need to prove he or she is worthy of doing so.\textsuperscript{208} Like the bad conduct exception this proposal will deter future harm from this inexcusable carelessness.\textsuperscript{209}

Alternatives to this article's proposal do exist. For example, some scholars may argue that the doctrine of reformation is the proper method for remedying patent defects in a will or trust.\textsuperscript{210} Reformation is an equitable remedy used to modify a written agreement to reflect the actual intent of the parties; however, after the testator's death, it is not a viable solution, because actual intent cannot be determined with certainty.

Another solution might be to liberally admit extrinsic evidence, similar to the way in which it is used for latent ambiguities.\textsuperscript{211} Currently five jurisdictions openly allow extrinsic evidence to explain patent ambiguities.\textsuperscript{212} Other jurisdictions have eliminated the patent/latent distinction by mis-classifying the patent ambiguity as latent and admitting extrinsic evidence.\textsuperscript{213} Some courts adhere to the no extrinsic evidence rule in the case of a patent ambiguity despite the

\begin{itemize}
  \item \textsuperscript{207} Damages would include recovery for reasonable attorney's fees.
  \item \textsuperscript{208} See supra pt. IV.B.2 & 3. (discussing the approaches requiring a third party claimant to prove that he or she was entitled to proceed with the malpractice action).
  \item \textsuperscript{209} See supra pt. IV B.2.a.
  \item \textsuperscript{210} E.g. deFuria, supra n. 36, at 1; John H. Langbein & Lawrence W. Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 30 U. Pa. L. Rev. 521 (1982).
  \item \textsuperscript{211} See supra pt. II.B.2.(discussing extrinsic evidence rule for latent ambiguities).
  \item \textsuperscript{212} See e.g. In re Estate of Cole, 621 N.W.2d 816, 819 (Minn. App. 2001) (noting that Wisconsin, Arizona, New York and Maine allow extrinsic evidence to explain patent ambiguities); \textsuperscript{In re Hurley,} 248 N.W. 194, 195 (S.D. 1933) (allowing extrinsic evidence in the construction of patent ambiguities); Carlisle v. Estate of Carlisle, 252 So. 2d 894, 895 (Miss. 1971) (finding that the word meaning of the "home" a patent ambiguity, and therefore, allowing extrinsic evidence).
  \item \textsuperscript{213} Brandt, supra n. 67, at 24. "Extrinsic evidence will not come in to explain a patent ambiguity—one that appears on the face of the document, but will be admissible to cure a latent ambiguity—one that does not appear on the face of the will, but instead appears when the will is applied to the testator's property or beneficiaries. . . . The latent/patent distinction for the admissibility of extrinsic evidence is problematic, at best." \textit{Id.}
consequences and the reliability of extrinsic evidence. For example, in one case in the District of Columbia, despite the fact that all available extrinsic evidence pointed to the plaintiff, the property escheated. The truth is that the distinction between patent and latent ambiguities for the admissibility of extrinsic evidence is shrinking. Liberally admitting extrinsic evidence reflects the client's alleged wishes, prevents unjust enrichment to those not intended by the testator, and allows the third party to recover from the estate. A rule favoring the admission of extrinsic evidence more likely insulates the attorney from paying for errors caused by his or her negligence. If the third party recovers from the estate, he or she can not recover again from the attorney for malpractice. A liberal rule of construction as to patent defects will not force attorneys to improve practices to avoid future harm, but instead will rescue them from liability. However, there is a greater good in preventing future harm, which is ignored when extrinsic evidence is admitted. A rule that freely considers extrinsic evidence would not deter the patent ambiguity problem.

Furthermore, there is no assurance that using extrinsic evidence to resolve the patent ambiguity will accurately ascertain the true intentions of the testator. Due to the testator's absence, extrinsic evidence provides no certainty. Although this rule of construction attempts to do what the testator intended from the start, it would place the careless attorney at a lower risk of being sued. The law is filled with rules of construction, which assist the sloppy estate planners. For

214. See Knupp v. D.C., 578 A.2d 702, 705-706 (D.C. 1990). "No matter how clearly a testator's wish to make a particular disposition may appear from sources outside the will, a court [cannot] give it effect unless the words written into the will effect that disposition or are reasonably susceptible to ... interpretation." Id. In Knupp, the extrinsic evidence included an affidavit by the attorney "admitting that he . . . failed to designate a residual beneficiary in the will even though the testator had instructed him to name Knupp" and the fact that the testator's two prior wills named Knupp. Id. at 704.

215. Id. at 703.

216. Brandt, supra n. 67, at 24.


219. Supra n. 183 and accompanying text (discussing the balancing of factor element of preventing future harm).

220. See Jarboe, supra n. 5, at 1373 n. 51.
example, the presumption against intestacy, the four-corner rule, and the plain meaning rule protect the sloppy estate-planner. This article suggests that extrinsic evidence should be used to ascertain the injury caused by the patent ambiguity. Thus, all extrinsic evidence should be considered to determine which third party was harmed and to what extent. This proposal advocates for the use of extrinsic evidence, not to save the negligent attorney from liability, but to determine who should recover from the attorney and how much.

This proposal is not overly burdensome for general practitioners or sole proprietors. It will require them to implement essential steps and procedures to avoid patent defects in testamentary documents. Holding attorneys accountable for the grossly negligent preparation of testamentary documents will require estate planners to shape up or ship out. This policy will prevent future harm and will provide an incentive for attorneys to pay greater attention to detail and encourage specialization.

This author acknowledges that the lack of certainty in ascertaining harm remains. An unavoidable risk exists that the patent ambiguity may be resolved in favor of the beneficiary who is best positioned to litigate. The extrinsic evidence itself can assist the court in its determination as to reliability. However, the overriding policy that makes it necessary to protect against the carelessness that

221. Dobris, supra n. 2, at 262.
222. Young v. Allstate Ins. Co., 812 N.E.2d 741, 747 (Ill. App. 1st Dist. 2004) (finding that “under the ‘four corners rule,’ a written agreement must be presumed to speak the intention of the parties who signed it and the intentions regarding its execution must be determined from the language used, unchanged by extrinsic evidence”).
223. Plain meaning rule is defined as “if a writing, or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence.” Black’s Law Dictionary at 1188.
224. Supra n. 21 (discussing that damages naturally flow and will depend on the size of the estate or the patent defect. For example, if the patent uncertainty failed to designate a residual beneficiary, then the amount that passes intestate as a result of the defect should be the amount of damages received by the individual who would have taken the rest and residue but for the patent defect.).
225. These are skills that academics impress upon students with the hopes that they will follow students as they enter into the practice of law.
226. See generally Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (discussing attorney’s need to defend and the costs they might be willing to spend to do so).
caused the patent ambiguity nonetheless warrants these changes in the law to allow the admissibility of extrinsic evidence to show injury.

VI. CONCLUSION

In the estate-planning area, the standard of competent representation amounts to a detailed set of requirements necessary to ensure the document complies with statutory formalities and is free from patent ambiguities. Yet, an attorney’s failure to render this level of service is of no consequence to the negligent attorney. The current law fails to impose a duty on the attorney to draft documents free from patent ambiguities that would extend to and protect third parties at the testator’s death. The existence of a patent ambiguity in a testamentary document should be prima facie negligence.227 This article proposes that when legal services are rendered in the preparation of testamentary documents, the duty of care, which amounts to competent representation, requires that the resulting document be free from patent ambiguities, and further, that such duty be extended to third parties. Third parties harmed by the patent ambiguity must be permitted to introduce extrinsic evidence, not to insulate the attorney from a malpractice claim, but to fuel his or her cause of action.

Current law provides insufficient protection for such an obvious error. In light of the consequences to the third party, policy warrants changes that equate to a real remedy and will deter future harm. Neither the Model Rules of Professional Conduct nor existing malpractice rules serve as a sufficient deterrent. These proposed changes will encourage competent representation and provide third parties with a viable avenue to pursue a remedy when testamentary documents are patently defective.

227. This is not the first time a permitted inference of negligence has been drawn. See e.g. Brammer v. Taylor, 338 S.E.2d 207, 213 (W. Va. 1985) (finding that negligent supervision of the testator’s codicil would be prima facie negligence).