

No. 6736 - I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FRANCES M. HAWKINS, and LOUISE MARKERT
as Guardian ad litem for MICHAEL J. HAWKINS,

APPELLANTS,

vs.

RICHARD SANDERS

9

RESPONDENT.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NORMAN QUINN, JUDGE

BRIEF OF RESPONDENT SANDERS

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SUMMARY OF ARGUMENT

- A. Respondent Richard Sanders, as a court appointed attorney in a criminal case, is immune from a suit for malpractice/negligence by his former client.
- B. Both the attorney-client privilege and the physician-patient privilege barred Sanders from voluntarily disclosing to the court/prosecutor in a bail hearing that one psychiatrist thought his client might be dangerous if released.
- C. Respondent Sanders was ethically precluded from voluntarily disclosing to the court/prosecutor in a bail hearing that one psychiatrist thought his client might be dangerous if released.
- D. Respondent Sanders, as a criminal-defense lawyer did not owe any legal duty to a third party not his client, such as plaintiff Frances Hawkins.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On July 1, 1975 appellant Michael J. Hawkins was arrested and booked into the King County jail for the misdemeanor charge of possession of marijuana. (Seattle District Court Cause Number 10118) On July 3, 1975 respondent Richard Sanders, an attorney, was appointed by the court to represent Mr. Hawkins in his defense of this criminal charge.

After his appointment, Sanders promptly visited Hawkins in the jail for about forty-five minutes. During this conference, Hawkins seemed rational, normal and appeared to understand and answer Sanders' questions. He directed Sanders to secure his release from jail. Hawkins did not tell Sanders that he planned to attack anyone.

Shortly before obtaining Hawkins' release, Sanders received a telephone call from a Mr. Palmer Smith, another attorney, and a call from Doctor Elwood Jones, a psychiatrist. Mr. Smith and Dr. Jones indicated to Sanders that it was their view that Michael Hawkins was mentally ill and potentially dangerous to himself and others. However, Sanders also learned prior to Michael Hawkins' release that Mrs. Hawkins had previously attempted to have Michael Hawkins civilly committed and had failed. Sanders told Smith, Dr. Jones and/or Mrs. Hawkins that he intended to comply with his client's directive and help Michael Hawkins

get out of jail. Not one of them requested a chance to be present at any bail or release hearing.

On July 9, 1975 District Judge Howard released Michael Hawkins from jail on a \$3,000.00 personal surety bond. Neither the Prosecutor nor the Judge questioned Sanders, or requested information from him, about Michael Hawkins' mental state. Sanders did not make any false or misleading statements of law or fact either to the Court or to the Prosecutor about any matter, including Hawkins' mental condition. Sanders did not, however, volunteer that Smith and Jones thought that Michael Hawkins was mentally ill.

Smith, Dr. Jones and Mrs. Hawkins were all immediately informed about Michael Hawkins' release. In fact, after his release, on at least two occasions, Michael Hawkins, Mrs. Hawkins, Sanders and Dr. Jones all met together in a counseling environment.

Later, about eight days after his release on July 17, 1975, Michael Hawkins assaulted his mother and unsuccessfully attempted suicide.

At no time after Michael Hawkins' release but prior to the attack and suicide attempt did Mrs. Hawkins, Dr. Jones or Palmer Smith express any objections or resentments about his release from jail. In fact, not one of them ever attempted to have Michael Hawkins civilly committed after his release from jail.

B. STATEMENT OF PROCEDURE

On February 18, 1976 appellants originally filed this case. (King County Cause Number 808417.) Respondent Sanders was not named as a party. On April 29, 1976 appellants took a voluntary non-suit in said case.

On August 16, 1976 appellants filed the instant case. (King County Cause Number 816642.) Again respondent Sanders was not named.

On April 15, 1977 appellants took the deposition of Sanders, who was still not a party. Sanders appeared without counsel because appellant's lawyers told Sanders he was not a defendant, was just a witness, and that they were not planning to sue him. Thereafter on November 30, 1977 appellants obtained leave to amend their complaint and named Sanders as a party defendant.

On May 9, 1978 Sanders filed a motion to dismiss for failure to state a claim. Both appellants and respondent Sanders filed briefs. On June 16, 1976 the Honorable Norman Quinn heard oral argument from both counsel. At the conclusion of the hearing, Judge Quinn signed an order dismissing Sanders. Subsequently on June 29, 1978 Judge Quinn signed an amended order, entering summary judgment and permitting appellants an interlocutory appeal.

On July 6, 1978 appellants filed their notice of appeal from the dismissal of respondent Sanders.

ARGUMENT

A. RICHARD SANDERS, AS A COURT APPOINTED CRIMINAL DEFENSE ATTORNEY, IS IMMUNE FROM A SUIT BY HIS FORMER CLIENT FOR MALPRACTICE/NEGLIGENCE.

An appointed public defender, like the prosecutor, Imbler v. Pachtman, 424 U.S. 409 (1976), and the judge, Pierson v. Rhy, 386 U.S. 547 (1967) is immune from suits based on claims arising out of his official duties as appointed criminal counsel.

The following courts have held that a court-appointed criminal defense attorney is absolutely^{1/} immune from any suit for malpractice, negligence, or civil rights violation emanating from his official duties:

^{1/} Absent proof of gross negligence or recklessness, a few courts have held that an appointed criminal defense attorney enjoys a qualified immunity from suits for malpractice, negligence or civil rights-violations. See for example

John v. Hurt, 489 F.2d 786 (7th Cir. 1973);
Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973)
(Applying Illinois state law);

Morrow v. Igleburger, 67 F.R.D. 675, (S.D. Ohio 1975); Beaver v. Carey, 426 F. Supp. 301 (N.D. Ill. 1977).

However the limited or qualified immunity doctrine has been soundly criticized as inadequate. In Miller v. Barilla, infra, the Ninth Circuit specifically considered and rejected qualified immunity saying:

"Any qualified immunity doctrine would force defense of suits well through the pleading stages, and place a substantial drain on an already burdened legal services resource. Additionally, each public defender would be constrained to weigh every decision in terms of potential liability." [Citing Minns v. Paul] Id. at 650.

Third Circuit: Waits v. McGowan, 516 F.2d
203 (3rd Cir. 1975);
Brown v. Joseph, 463 F.2d
1046 (3rd Cir. 1972);

Fourth Circuit: Minns v. Paul, 542 F.2d
899 (4th Cir. 1976);
Jones v. Warlick, 364 F.2d
828 (4th Cir. 1966);

Fifth Circuit: Sullens v. Carroll, 446
F.2d 1392 (5th Cir. 1971);

Seventh Circuit: Robinson v. Bergstrom, 579
F.2d 401 (7th Cir. 1978);

Ninth Circuit: Miller v. Barilla, 579
F.2d 648 (9th Cir. 1977).

In all of these cases, the courts could not find any sound reason for distinguishing between judges and prosecutors, who have long enjoyed immunity, and court-appointed criminal defense attorneys. In fact these courts pointed to and relied on persuasive public policy reasons why immunity should cover the acts of court appointed criminal attorneys as well as judges and prosecutors. Two reasons seem to stand out in particular as justifying immunity:

- (1) to encourage the recruitment and retention of able attorneys in public defender roles; and
- (2) to encourage professionalism and the free exercise of counsel's discretion and judgment.

In Brown v. Joseph, supra, the Third Circuit noted that:

"To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the presiding

judge, and counsel of a co-defendant, privately retained or court-appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar. . . . To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions. Moreover, as stated in the Public Defender's brief, 'the most probable result of such a decision would be the exact opposite of what the courts want. Both the Court and the Public Defender's Office [seek] adequate representation of defendants in criminal proceedings, as well as the [expeditious] handling of cases. However, if a civil rights suit from unsatisfied clients is a constant threat to the Attorney involved, then there would be a chilling effect upon Defense Counsel's tactics. Defense Counsel would be caught in an intrinsic conflict of protecting himself and representing his client.'

We hold, therefore, that a county Public Defender, whose office is created under the Pennsylvania statute, enjoys immunity from liability under the Civil Rights Act." Id. at 1049.

Similar sentiments were echoed by another court in John v. Hurt, supra. The court there dismissed a claim against a court-appointed criminal defense attorney on the basis of immunity, observing that:

" . . . the extension of immunity to public defenders will encourage their free exercise of discretion in the performance of professional obligations, as well as aid the recruitment of able men and women for public defender positions." [Citing Brown v. Joseph] Id. at 788.^{2/}

^{2/} Respected commentators have also suggested that a court appointed criminal defense attorney should be entitled to immunity. Nakles, Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability, 81 Dick.L.Rev. 229 (1977).

Although there is no Washington state case precisely on point, by statute the Washington State Legislature has defined the public policy on this issue. R.C.W. 2.50.020 declares that: "The promotion of organized legal aid is hereby declared to be in the public interest." (Emphasis added.)

For a court to subject a court-appointed criminal defense attorney to the spectre of a negligence suit every time a defendant became disenchanted would hardly be consistent with the legislature's stated public policy of encouraging legal aid. The best attorneys would not take appointments if, in addition to facing the financial sacrifice of \$20/hour remuneration, they also were faced with the prospect of endless, expensive personal lawsuits to defend. And even if attorneys of lesser ability accepted the appointments, it is doubtful that client would get the same, zealous defense if the lawyer knew he was responsible for the acts committed by his client while out on bail?

All the courts that have considered the issue squarely appear unanimous that the public policy of encouraging legal aid necessitates and justifies immunity from suit for a court-appointed criminal defense attorney.^{3/} Washington State has a

^{3/} Appellants Hawkins cavalierly attempts to "distinguish" these cases (although they never mention them or cite them) by saying that they do not apply because the courts held that a court appointed attorney was not acting under "color of state laws;" therefore the "state action" element of a federal civil rights claim was missing; and the cases were dismissed without reaching the immunity issue. However only one appellate court has so held, Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). In all other cases, cited supra at page 7, the courts decided the issue of immunity on the merits.

statute declaring legal aid to be in the public interest. Accordingly, the court below properly gave effect to R.C.W. 2.50.020 by dismissing the claims against defendant Sanders, a court appointed defense attorney.

B. THE ATTORNEY-CLIENT PRIVILEGE AND THE PHYSICIAN-PATIENT PRIVILEGE BARRED RESPONDENT SANDERS FROM VOLUNTARILY DISCLOSING AT A BAIL HEARING INFORMATION THAT HIS CLIENT WAS DANGEROUS WHEN SANDERS WOULD NOT HAVE HAD THIS INFORMATION BUT FOR HIS ATTORNEY-CLIENT RELATIONSHIP WITH MICHAEL HAWKINS.

Prior to securing Michael Hawkin's release, a Doctor Elwood Jones, a psychiatrist who had been counseling Michael Hawkins, told Sanders that Hawkins was dangerous. Sanders maintains that both the attorney-client privilege and the physician-patient privilege barred him from disclosing this information to third parties. Appellants maintain that Sanders did not receive this information directly from his client and that the information was not confidential, so he could disclose it.^{4/}

By statute Washington State has codified both the common law attorney-client privilege and the physician-patient privilege. R.C.W. 5.60.060 states in part that:

Footnote 3/ (continued).

Moreover appellants have made no attempt whatsoever to say why the policy reasons utilized by five different circuit courts are inapplicable to the facts of this case.

^{4/} The fact that Sanders could disclose it does not necessarily mean in any event that he was required to disclose it. Appellants have not cited any case that even remotely suggests a legal duty to disclose this information.

"(2) An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

"(4) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof."

The attorney-client privilege applies to criminal as well as civil proceedings. R.C.W. 10.58.010 State ex rel. Sowers v. Olwell, 64 Wn.2d 828 (1964). In the Olwell case a contempt citation was reversed when an attorney refused, on grounds of the attorney-client privilege, to comply with a subpoena duces tecum directing him to produce a knife believed to be the murder weapon. The court went on to say that the privilege covers communications from a client to his attorney about any crime or fraudulent transaction.

Similarly, the physician-patient privilege is applicable to criminal proceedings as well. As early as 1919 in State v. Miller, 105 Wash. 475 (1919) the court reversed a conviction for indecent liberties because the defendant's doctor testified over objection. This rule has been reaffirmed on numerous occasions. State v. McCoy, 70 Wn.2d 964 (1967); State v. Miller, 3 Wn. App. 596 (1970). See also R.C.W. 10.58.010.

It makes no difference in this case that any communication to Sanders was from Doctor Jones and was not directly from Hawkins to Sanders because the privilege necessarily includes agents and their communications. If the doctor is viewed as an agent of the attorney retained to examine a criminal defendant, then any communications from the doctor to the attorney are privileged. 8 Wigmore Evidence, § 2301. ("the privilege must include all the persons who act as the attorney's agents.") People v. Goldbach, 27 Cal. App. 3d 568, 103 Cal. Rptr. 800 (1972). In the Goldbach case the privilege barred any communication made by a defendant to a psychiatrist who was appointed at court expense as a defense consultant.

The privilege is equally applicable if the doctor is viewed as an agent of the defendant rather than an agent of the attorney. 8 Wigmore, Evidence § 2317 state that:

"The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by any form of agency employed or set in motion by the client is within the privilege."

"This of course includes communications through an interpreter, and also communications through a messenger or any other agent of transmission, as well as communications originating with the client's agent and made to the attorney."

In People v. Hilliker, 185 N.W. 2d 831 (Mich. 1971) a psychiatrist employed by the defense to examine the defendant was held to be "defendant's agent for the transmission of confidential facts to his attorney in furtherance of the attorney-client privilege." Accordingly, the psychiatrist's report to the attorney as well as his testimony about his findings were ruled privileged and inadmissible.

A recent case from yet another jurisdiction supports the holding and policies of the Goldbach and Hilliker cases. In State v. Mingo, 392 A.2d 590 (N.J. 1978) a rape conviction was reversed because the prosecution had, over the defendant's objection, called to the witness stand a hand-writing expert retained by the defense but not called as a defense witness. Like the instant case the communication from the expert was made directly to the defense attorney and was not made directly by the client to his counsel. Nevertheless the New Jersey Supreme Court said:

"We accordingly hold that the report and testimony of a defense-retained expert consultant who will not testify as a defense witness and whose report will not be utilized as evidence are not available to the State. This rule will safeguard the internal strategic processes of the defense. The protection such a rule affords will enhance the ability of the defense attorney to provide effective representation by affording him the maximum freedom to seek the guidance of expert advice in assessing the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against his client. A defense attorney should be completely free and unfettered in making a decision as fundamental as

that concerning the retention of an expert to assist him. Reliance upon the confidentiality of an expert's advice itself is a crucial aspect of a defense attorney's ability to consult with and advise his client. If the confidentiality of that advice cannot be anticipated, the attorney might well forego seeking such assistance, to the consequent detriment of his client's cause. The protection from unwarranted disclosure we today mandate is an indispensable element of a criminal defendant's constitutional right to the effective assistance of counsel." Id. at 595.

Accord: United States v. Alvarez, 519 F.2d 1036, 1047 (3rd Cir. 1975) (reversible error found when government called a psychiatrist consulted by the defense.)

Under the Mingo and Alvarez cases, the state could not have called Doctor Jones as a witness if Sanders had retained him as a defense expert to examine Michael Hawkins. Accordingly appellant's claim that Sanders was duty-bound to volunteer this very same information must fail.

The case of State v. Broussard, 12 Wn. App. 355, 529 P. 2d 1128 (1974), cited by appellants has nothing to do with this case. In that case the court simply reaffirmed the long-standing distinction between testimonial evidence (e.g. such as communications from a client or from the client's or attorney's agent) and non-testimonial evidence of a strictly physical nature such as a bullet, a hair sample, or a finger print. Appellants have again failed to find or cite any Washington case that has ever held that confidential communications from a client through an expert must be divulged, much less volunteered.

C. RESPONDENT SANDERS WAS ETHICALLY BARRED FROM VOLUNTEERING THE INFORMATION ABOUT HIS CLIENT'S ALLEGED MENTAL HEALTH PROBLEMS.

In Washington State, the Code of Professional Responsibility is more than just an ethical goal for attorney's conduct because the Legislature has adopted it in full by statute and declared it to be the ethical standard for attorneys in this state. R.C.W. 2.48.230 The violation of these standards subjects an erring attorney to discipline. DR 4-101(B)(1-3).

The Canons require "undivided loyalty" to the client while simultaneously maintaining one's function as an officer of the court. Canons 6, 7, Code of Professional Responsibility. The A.B.A. Standards on the Defense Function, 1.6, states that:

"1.6 Client interest paramount.

Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance."

As a result of this precept, an attorney must place his client's needs and desires above those of third parties.

In addition to the attorney-client privilege, a lawyer must also guard against the disclosure of other information that, strictly speaking, might not fall within the confines of an evidentiary privilege. Canon 4 states: "A lawyer should preserve the confidences and secrets of a client".

DR 4-101(A) defines a secret as:

"'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

DR 4-101(B) states that:

"(B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use of confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

Some of the ethical considerations for Canon 4 are relevant to a lawyer's duty to volunteer information. For example EC4-2 states in part that:

"A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship."

EC4-4 states in part that:

"The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

EC4-5 provides that:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client..."

Measuring the facts of this case against this Canon, the disciplinary rules and the ethical considerations, the conclusion follows that Sanders could not disclose, let alone volunteer, the information from Doctor Jones. The information came to Sanders only because and through his capacity as an attorney for Michael Hawkins.^{5/} There is nothing in the record suggesting Michael Hawkins did not wish it to remain inviolate. The disclosure of an allegation of mental illness would certainly have been embarrassing to Hawkins. Moreover, when Hawkins wanted a release from jail, the disclosure would have been detrimental. Therefore the information was a "secret" within the meaning of DR4-101(A).

DR4-101(B)(1) unequivocally states that as a general rule an attorney can not reveal a secret. Moreover to reveal the secret would have been to Hawkins' disadvantage in that, contrary to his expressed wish, he might not have been released from jail. DR4-101(B)(2). To reveal the secret because of fears of third parties, such as Mrs. Hawkins, would have violated DR4-101 (B)(3).

Appellants have attempted to seize an DR4-101(C) as grounds for their position. Said provision reads in full:

(C) A lawyer may reveal:

^{5/} DR4-101(A) does not say that the communication must be made directly and only from the client to the attorney.

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against ^{6/}an accusation of wrongful conduct.

Because there is no allegation that Michael Hawkins consented to disclosure, or told Sanders he was about to commit a crime, or had a fee dispute, only subsection C(2) is even arguably relevant.

In this case there was no court order requiring disclosure. As previously noted, there is no statute or case that mandated disclosure, so appellants must find a disciplinary rule directing disclosure. However none exists. In fact the numerous ABA Ethics opinions which have considered an attorney's duty to disclose also mandate affirmance of the Trial court's decision.

One of the most common situations involves client perjury. The opinions seem clear that an attorney is not required to divulge perjury, but must advise the client against it and cease representation and withdraw if the client persists or

^{6/} This provision states a lawyer "may" reveal; again there is no requirement that he "must" reveal.

refuses to recant. Formal Opinion 287, Informal Opinions 1314, 1318. Similarly, an attorney is not under a duty to disclose to a tribunal the weaknesses in his case. Formal Opinion 314. An attorney is also not required to correct misinformation. Formal Opinions 287, 274, 268.

In Opinion 23 (1930) the Ethics Committee was faced with the question whether a criminal defense attorney has a duty to disclose to the prosecutor the whereabouts of a fugitive client. The Committee unanimously concluded he did not, saying:

"It is in the public interest that even the worst criminal should have counsel, and counsel cannot properly perform their duties without knowing the truth. To hold that an attorney should reveal confidential information which he has obtained, by virtue of his professional employment, from members of the family of a criminal, would prevent such frank disclosure as might be necessary to a proper protection of the client's interest."^{7/}

Informal Opinion 869 (1965) also suggests that Sanders was not required to disclose Doctor Jones' views about his client's mental health. In 869, a lawyer inquired whether of his own volition he was required to reveal to the court in a divorce case that his client was pregnant by someone other than her husband when such an admission would defeat her case. The Committee said "there was no duty on the part of the lawyer to reveal to the

^{7/} Like the instant case, Opinion 23 also involved a situation where information damaging to the client was directly obtained from someone other than client.

court of his own volition" that information.

Informal Decision C-778 (1964) also supports respondent's position. In that case, an attorney for a court appointed guardian for a ward learned that the guardian had misappropriated a considerable amount of the ward's estate. The attorney wanted to know if he had a duty to report the misappropriation to the court. The Committee concluded that he did not.

The applicable Canon, disciplinary rule, ethical considerations and ethics opinions uniformly support the position that, in order to foster attorney-client trust, there is no duty to divulge perjury, disclose weaknesses, or correct misinformation. If such is the case, then a fortiori Sanders was not required to volunteer at a bail hearing in a criminal case information he obtained as an attorney that one doctor thought his client might be mentally deranged and therefore should not be released.^{8/}

D. THE COURT BELOW CORRECTLY RULED THAT RESPONDENT SANDERS, AS A CRIMINAL DEFENSE ATTORNEY, DID NOT OWE A LEGAL DUTY TO THIRD PARTY NOT HIS CLIENT.

Because defendant Sanders is immune from Michael Hawkins' suit, he should a fortiori be immune from suit by Michael's mother. Because Sanders was precluded from volunteering testimony about Michael's mental condition, Frances Hawkins' suit must also

^{8/} In fact voluntary affirmative disclosure of such information could conceivably subject the attorney to tort liability because he is arguably under a duty to assist his client in obtaining a release from jail. See Restatement 2d Torts § 45.

fail. However Frances Hawkins' was correctly dismissed for an independent reason -- Sanders did not owe her, as a member of the general public, any legal duty.

Mrs. Hawkins has alleged non-feasance; namely that Sanders failed to volunteer information about her son's mental status. However because there was no special relationship between Sanders and Mrs. Hawkins, Sanders is not liable to her.^{9/}

Absent a special relationship, an alleged tortfeasor is generally not liable to third parties for non-feasance. Prosser, Torts, § 56, p. 339, Restatement 2nd, Torts, § 314A, Dean Prosser has said that:

"Liability for 'misfeasance,' then, may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond; while for 'nonfeasance' it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." Id. at 339 (emphasis added).

Section 314(a) of the Restatement 2nd Torts lists the following special relationships giving rise to potential liability to third parties for non-feasance: (1) common carrier, (2) innkeeper, (3) possessor of land, and (4) one with custody of the third party. No other special relationships are identified and an attorney is not one of the enumerated roles, nor is the mother

^{9/} In fact Mrs. Hawkins pleads that the general public was owed a duty and that she as a member of the general public was therefore owed a duty. No special relationship is even alleged.

of a criminal defendant. Accordingly Sanders as a matter of law was not liable to Mrs. Hawkins for any non-feasance.

Mrs. Hawkins cannot claim that Sanders was somehow guilty of malfeasance or misfeasance, and therefore any negligence toward her is actionable. Because a lawyer must keep his client's interest paramount and avoid even the potential of compromise or conflict, the courts have generally held that an attorney is not liable for his negligence to anyone other than his client.

In National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621 (1879) the Supreme Court said that an attorney can not be held liable for the consequences of his professional negligence to anyone other than his client absent special circumstances. Such "special circumstances" seem to have been limited to will drafting or title search opinions wherein an attorney knew or should have known that there were third parties who were either relying on his actions or intended beneficiaries of his actions. See generally Attorneys-Liability to Third Parties, 45 ALR 3rd 1181. This case of course does not involve a title search or the drafting of a will. Therefore Mrs. Hawkins, who lacked a "special relationship," also lacked the "special circumstances" required for Sanders to be liable to her.

One of the most recent cases to consider an attorney's liability to third parties not his clients was Goodman v. Kennedy, 18 Cal. 3d 335, 134 Cal. Rptr. 376 (1976). In that case the plaintiffs, who were stock purchasers, brought suit against an

attorney claiming he was negligent in advising his clients, the sellers of the stock. The Supreme Court affirmed a dismissal of the case, holding that the attorney did not owe the prospective buyers who were not his clients any legal duty.

The court said:

"The present defendant had no relationship to plaintiffs that would not give rise to his owing plaintiffs any duty of care in advising his clients that they could sell the stock without adverse consequences. There is no allegation that the advice was ever communicated to plaintiffs and hence no basis for any claim that they relied upon it in purchasing or retaining the stock. Nor was advice given for the purpose of enabling defendant's clients to discharge any obligation to plaintiffs. Thus, there is no allegation that plaintiffs had any relationship to defendant's clients or to the corporation as stockholders or otherwise when the advice was given.

. . . .

To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the 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 counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal 'would prevent him from devoting his entire energies to his client's interests'. The result would be both 'an undue burden on the profession' and a diminution in the quality of the legal services received by the client." Id. at 381 (citations omitted).

Accord: Norton v. Hines, 49 Cal. App. 3d. 917, 123 Cal. Rptr. 237 (1975).

The only case found involving a claim by a third party not a client against a criminal defense attorney supports the trial court's dismissal of Mrs. Hawkins' claim. In DeLuca v. Whatley, 42 Cal. App. 3d. 514, 117 Cal. Rptr. 63 (1974), the California Court of Appeals was faced with a claim by a former witness in a case against the criminal defense attorney who called him. The Court affirmed a dismissal of the case saying:

"To state the problem is to decide this case. When an attorney defends a person accused of a crime he has but one intended beneficiary - his client. (In re Hochberg, 2 Cal. 3d. 870, 878, 87 Cal. Rptr. 681, 471 P.2d 1; People v. Chacon, 69 Cal. 2d 765, 773-775, 73 Cal. Rptr. 10, 447 P.2d 106, 34 A.L.R.2d 454." Id. at 64.

If non-feasance was alleged, Mrs. Hawkins' claims was properly dismissed because there was no special relationship between herself and Sanders. If general negligence was alleged, the special circumstances limited to drafting and title search cases wherein there is reliance or an intended beneficiary are absent. Lastly the only case close to being on point is squarely against her. Sanders only duty was to his client. Her claim was properly dismissed.

CONCLUSION

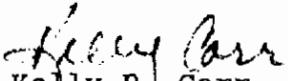
Appellants have attempted to create a novel cause of action, but have been unable to find even one case to support it. To the extent there is any authority, it is to the contrary.

Sanders had no duty to inform the prosecutor or court about any alleged mental problems suffered by his client. In fact, Sanders was ethically barred from doing so. Moreover, that type of evidence was inadmissible as it was privileged. And even if there was any such duty to volunteer such information, public policy dictates that Sanders be immune from suit. Lastly, Sanders had no duty to appellant Frances Hawkins.

For all these reasons, the decision of the trial court granting respondent Sanders motion for summary judgment should be affirmed.

Respectfully submitted,

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DATED this 7th day of February, 1979.