

Potential legal opinion liability for Ohio business lawyers

by Phillip M. Callesen and James W. May


Lawyers know that one of the biggest risks of practicing law is that a client may sue the lawyer for malpractice. Defending a malpractice lawsuit is a scary idea, but for most of us the risk is low, and we are aware of the usual pitfalls that expose lawyers to malpractice liability.

Business attorneys do not usually think about our potential liability to parties other than our clients. However, business lawyers frequently do something that exposes them to a lawsuit by a third party—deliver legal opinions. In many situations, a lawyer might provide a legal opinion, but this article focuses on instances in which a lawyer provides an opinion regarding his or her client for the benefit of a third party.

Many business deals, especially those involving mergers and acquisitions and bank loans, require lawyers to provide legal opinions regarding their client to nonclients. For example, a lender often requires the borrower's counsel to give a formal written opinion (on the letterhead of the borrower's counsel) that, among other things, the loan documents are enforceable, the interest rate of the loan does not violate applicable usury law and that all corporate actions necessary to approve the loan have been taken by the borrower. The legal opinion is addressed to the lender and is binding on the firm who gives the opinion.

In the context of mergers and acquisitions, the seller's counsel is often required

by the purchaser to opine that there is no pending or threatened litigation against the seller. What if a lawyer or law firm provides this opinion when the firm knows that there is, in fact, a lawsuit threatened by someone? This was the issue in the 2004 Massachusetts case of *Dean Foods v. Arthur J. Pappathanasi*.¹ Prior to the sale of its business, the seller retained a law firm to represent the business in a government investigation into an alleged kickback scheme. The government inquiry, which included a grand jury subpoena and follow-up requests by the assistant U.S. attorney, was unknown to the purchaser and unresolved at the time of the business' sale. The same law firm represented the seller in the business sale



and the government inquiry. Although partners at the law firm representing the seller were aware of the continuing government investigation, the firm provided a legal opinion stating that it did not know of any threatened or pending investigation against the seller. After the closing of the sale, the business was charged with, and pled guilty to, conspiracy to defraud the Internal Revenue Service. The purchaser, suing under a cause of action for negligent misrepresentation, prevailed against the seller's law firm for \$7.2 million, the amount of the fine levied by the government against the business.

Is a result like *Dean Foods* possible in Ohio? Ohio law does not yet have a published opinion with facts similar to *Dean Foods*.



However, there are Ohio cases that courts might look to if confronted with similar issues. But, before analyzing these Ohio cases, let us quickly review the Ohio Rules of Professional Conduct, which provide the authority for lawyers to give legal opinions to nonclients.

Ohio Rule 2.3

The Ohio rules are based on the American Bar Association Model Rules of Professional Conduct.² Ohio Rule 2.3 is the legal basis for a firm to provide a legal opinion to a nonclient: “A lawyer may agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.”

According to Comment 1 of Ohio Rule 2.3, a legal opinion to a nonclient third party “may be performed at the client’s direction or when impliedly authorized.” A good rule for any attorney who is asked to provide an opinion to a third party is to inform his or her client about the requirement or request for such an opinion. No firm wants to prove that it had implied authorization to give an opinion to a nonclient.

In the *Dean Foods* case, the client, or seller, authorized its firm to give the opinion to the nonclient, the purchaser. If a case with facts similar to *Deans Foods* were before an Ohio court, it is likely that the law firm providing the opinion would be in compliance with Ohio Rule 2.3. So, the question the court would likely face is not whether the firm had authority to give the opinion, but on what basis could the nonclient sue if the content of the opinion is wrong?

Legal malpractice

Even if a law firm has complied with Ohio Rule 2.3, there are other bases to challenge a legal opinion provided to a nonclient. One potential cause of action for a nonclient to sue the opinion provider is legal malpractice. A crucial case in Ohio, *Columbus Consol. Agency, Inc. v. Wolfson*, examined a law firm that opined to a client that an investment in the company to be sold to outside investors did not involve the sale of securities under either Ohio or federal securities law.³ The Ohio Division of Securities later found that the company selling the investment violated state securities laws by failing to register the security and by selling unregistered securities. In this case, the law firm gave the opinion to the client but not to the purchasers of the securities, who tried to

certify a class action against the firm for legal malpractice. The trial court denied class certification. The 10th District Court of Appeals upheld the trial court’s denial of class certification and reiterated the rule that “an attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.”⁴ Even though the third party’s reliance on the legal opinion could have been foreseen, such predictable reliance does not expose an opinion writer to liability to third parties.

Ohio’s privity test, as articulated in *Wolfson*, is clear. A third party must either be in privity with the opinion writer’s client, or be damaged by an attorney’s malicious act. A third party recipient of a legal opinion in the typical mergers and acquisitions opinion or bank loan opinion, as discussed above, would be in privity with the opinion writer’s client since opinions in these contexts are given directly to the purchaser or lender at the instruction or with the consent of the client.

Even if privity with the opinion writer is established, a third-party opinion recipient might have difficulty making a viable legal malpractice claim. One potential obstacle to a legal malpractice claim is the one-year statute of limitations that is triggered when the opinion recipient discovers or, in the exercise of reasonable diligence, should have discovered that his or her injury was related to the attorney’s act or non-act.⁵ Another potential obstacle is proving all three elements of a legal malpractice claim: The attorney owed a duty to the plaintiff; breach of the standard of care; and the breach was the proximate cause of the plaintiff’s injury.⁶ A plaintiff’s ability to prove these three elements depends on the facts of the particular case. However, establishing the standard of care that an Ohio lawyer has to a nonclient opinion recipient could be especially expensive and time-consuming, given the lack of Ohio case law on the subject.

If a legal malpractice claim were not an attractive option for a plaintiff, is there another claim that a nonclient can bring against the legal opinion provider?

Negligent misrepresentation

An alternative to the legal malpractice claim was articulated in an unreported case from the 6th Appellate District, *Orshoski v. Krieger*.⁷ In *Orshoski*, a prospective purchaser of a residential real estate lot asked his real estate agent if restrictive covenants for the development would prevent the purchaser from moving a prefabricated home onto the lot. The agent consulted the developer, who asked his attorney whether the prospective purchaser’s home would violate the restrictive covenants. The attorney told the developer that the home would not violate such restrictions. The developer told the agent, and the agent relayed the information to the prospective purchaser. The prospective purchaser bought the land,

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in reliance on the attorney's spoken opinion that there was no violation. The purchaser was later sued for violating the development's restrictive covenants and ordered by a court to remove the home from the land. The purchaser sued the developer's attorney for negligent misrepresentation.

The defendant attorney responded that the negligent misrepresentation claim had to be brought as a legal malpractice claim. Legal malpractice claims in Ohio have a one-year statute of limitations, which would have barred the plaintiff's claim. The trial court agreed and dismissed the purchaser's claim. The 6th District Appellate Court reversed, holding that a negligent misrepresentation claim against the attorney, with its four-year statute of limitations, is a separate and distinct claim upon which relief can be granted.⁸ The appellate court based its ruling on Section 552 of the Restatement of the Law 2d, which says:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The *Orshoski* court went on to say that "Ohio appellate courts, in following the mandates of the Ohio Supreme Court, have declined to extend, absent privity or malice, the right of a third party economically injured by a professional opinion or services rendered to a client by his attorney to maintain a cause of action against that attorney Nonetheless, our research fails to disclose any cases where these courts were asked to apply Section 552."⁹ The court then put two significant limitations on its holding. First, it limited the application of negligent misrepresentation lawsuits "to those in circumstances in which the attorney who provides the opinion is aware of the third party and intends that the third party rely upon the information."¹⁰ It then limited negligent misrepresentation claims to those parties "directly affected by the attorney's misrepresentation and whose interest is identical to those of that attorney's client."¹¹

The impact of *Orshoski* may be in how courts interpret the second limitation. A court must determine when the interest of the opinion provider's client is identical to the third-party opinion recipient. In *Orshoski*, for example, it could be argued that the prospective purchaser's interest was not identical to the developer, even though the court held that their interests were identical. The prospective purchaser wanted a place to live, and the developer wanted to make a sale. Both parties may have had similar interests in avoiding a lawsuit based on the restrictive covenant, but their interests were not "identical."

Dean Foods, the Ohio version

If a nonclient plaintiff were contemplating a lawsuit against a legal opinion provider under Ohio law, such plaintiff should consider both legal malpractice and negligent misrepresentation claims. Which claim would be more likely to prevail? The merits of each claim would, of course, depend on the facts of that particular case. See the chart below for some important questions to ask when evaluating each claim.

An Ohio attorney could use this guide to speculate as to how an Ohio court confronted with a case like *Deans Foods* might rule. Depending on the circumstances, a plaintiff alleging legal malpractice and negligent mis-



Negligent misrepresentation	Legal malpractice
Has the statute of limitations begun to run? If so, has the four-year statute of limitations expired for the claim?	Has the statute of limitations begun to run? If so, has the one-year statute of limitations expired for the claim?
Did the attorney supply false information? If so, did he or she use reasonable care in obtaining and communicating such false information?	Is there privity between the opinion provider and the opinion recipient?
Did the plaintiff suffer pecuniary loss as a result of justifiably relying on the false information provided by the attorney?	What is the standard of care for an attorney providing a legal opinion to a non-client?
Did the opinion provider intend the opinion recipient to rely on the opinion?	Can the plaintiff prove that the attorney's conduct proximately caused the plaintiff's injury?
Was the opinion provider's client's interest in the transaction the same as the opinion recipient?	

representation will likely find that each action has elements that will be difficult to establish. In a legal malpractice claim, establishing the standard of care for a legal opinion provider to a nonclient may be especially tricky, while a plaintiff pursuing a negligent misrepresentation claim may have trouble proving that the opinion provider's client's interest in the transaction was the same as the plaintiff's. The facts of a particular case could encourage an Ohio court to focus on one or more of the other elements of the claims list above. Ohio case law authority on this matter is thin, but given the lending and acquisition boom of recent years and the current turmoil in financial markets, we may see an Ohio court clarify the case law governing this issue soon. ■



Endnotes

¹*Dean Foods v. Arthur J. Pappathanasi* 1 (18 Mass.L.Rptr. 598).

²Ohio Rule 2.3 is similar in every material regard to Model Rule 2.3.

³*Columbus Cons. Agency, Inc. v. Wolfson*, 70 Ohio App.3d 467, (10th Dist. Ohio Ct. App. 1990).

⁴See *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, (5th Dist. Ohio Ct. App. 2008). "Privity," for purposes of rule that an attorney is not liable to a third party, for legal malpractice based on negligence, for the good faith representation of a client unless the third party is in privity with the client for whom the legal services were performed, is the connection or relationship between two parties, each having a legally recognized interest in the same subject matter.

⁵See *Werts v. Penn*, 164 Ohio App.3d 505, 2005-Ohio-6532, 842 N.E.2d 1102, (2d Dist. Montgomery County 2005).

⁶See *Montgomery v. Gooding, Huffman, Kelly & Becker*, 163 F.Supp.2d 831 (N.D. Ohio 2001).

⁷*Orshoski v. Krieger*, 2001 WL 1388037. It is important to emphasize that *Orshoski* is an unreported case, and there is no evidence that other Ohio courts have adopted its logic. However, *Orshoski* reveals an interesting argument that could be made by an aggrieved third party recipient of a legal opinion.

⁸See Ohio Rev. Code Ann. §2305.09(D).

⁹*Orshoski*, 5.

¹⁰*Id.*

¹¹*Id.*



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