The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Attorney's Duty of Care to Third Party

Powell ex rel. Harris v. John C. Wunsch, P.C., 989 N.E.2d 627 (Ill.App. 1st Dist. 2013)

Risk Management Issue: Does a lawyer owe a duty of care to non-client beneficiaries of an estate when representing the estate in a wrongful death action against third parties?

The Case: Perry's son Powell was adjudicated disabled and the court appointed his parents to serve as co-guardians of his person. When Perry died intestate and without any assets on April 11, 1999, he was survived by his wife (Leona) and his two children (Powell and Emma Smith). Leona hired a law firm ("the Law Firm") to bring a wrongful death action against the medical providers who treated Perry before his death. Leona subsequently filed a petition to appoint herself as the special administratrix of Perry's estate, and identified Leona, Powell and Emma as Perry's next of kin. The petition stated that they were entitled to recover under the Illinois Wrongful Death Act ("the Act") and the Illinois Survival Act (755 ILCS 5/27-6 (West 2010)). The petition was approved and Leona was appointed as special administratrix of her husband's estate.

The Law Firm filed a complaint, which included counts under the Act and the Illinois Survival Act, against the medical providers. The case settled against certain defendants, and Leona filed a verified petition for settlement and distribution of a wrongful death case (first settlement). Pursuant to the settlement, the amount distributable to Leona, as special administratrix, totaled $15,000, and Leona, Emma and Powell were identified as Perry's surviving next of kin. Powell was identified as a disabled adult and Leona was identified as his sole keeper and provider. Each next of kin was to receive $5,000. The court entered the order of settlement and distribution and, according to the order, Powell's settlement distribution of $5,000 was to be paid to Leona.

After negotiations, Leona filed a petition to approve a settlement with the remaining defendants and sought an order of distribution of settlement funds, whereby Leona, Emma and Powell were listed as Perry's heirs, and Powell was identified as Perry's disabled son. The court entered an order approving the second settlement distributing $118,091.35 to Leona and $118,091.34 to Powell. Emma waived her right to the second settlement proceeds. Again, Leona controlled Powell's distribution as his guardian.

In 2008, Emma became concerned about Powell's well-being after visiting him at Leona's home. She subsequently petitioned the probate court to remove Leona as guardian of Powell's person, or to appoint her as co-guardian. The petition also asserted that the funds distributed to Powell from the second settlement were deposited in an account in Powell's and Leona's names and the funds were not being expended toward his care. In 2009, the probate court entered an order removing Leona as Powell's guardian and appointed Emma as the plenary guardian of Powell's person.

The court also entered an order appointing a public guardian as plenary guardian of the estate of Powell. The public guardian then filed a complaint for professional negligence against the Law Firm as well as for fraud, breach of fiduciary duty and unjust enrichment against Leona. The complaint against the Law Firm arose out of allegations that the attorneys failed to protect the interest of Powell in allowing the distribution of all of the settlement proceeds from the second settlement to go to Leona.

The Law Firm moved to dismiss the complaint based on the fact that it had no attorney-client relationship with Powell, and therefore Powell had failed to properly allege facts supporting the existence of a duty and proximate cause against the Law Firm. In granting the motion, the circuit court reasoned that the Law Firm did not owe any duty of care to Powell because the attorney-client relationship was to benefit Perry's estate, and not the estate beneficiaries.

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On appeal, Powell's attorney argued that an attorney-client relationship existed based on Powell's classification as Perry's next of kin and the Law Firm was retained by the special administratrix of Perry's estate to bring a wrongful death action against the underlying defendant-doctors on behalf of Perry's next of kin. In response, the Law Firm again noted that it did not have a direct attorney-client relationship with Powell and further argued that Powell was not an intended beneficiary of the contractual relationship that the Law Firm did have with Leona, as special administratrix of Perry's estate.

In reversing the underlying court's dismissal of the complaint, the appellate court looked to the legislative intent behind the Act. The court held that because Powell was a next of kin, the Act was intended to compensate him, in addition to Leona, as a surviving spouse, and his sister Emma, also as next of kin, for the pecuniary losses resulting from Perry's death. According to the Act, wrongful death actions are brought in the name of the decedent's personal representative, but, unless otherwise provided, the surviving spouse and next of kin are statutorily identified as the beneficiaries of such causes of action. While the court acknowledged that the Law Firm did not directly enter into an attorney-client relationship with Powell, the court held that because the next of kin are the intended beneficiaries of a wrongful death cause of action, the attorneys litigating that case do owe a duty of care to the next of kin, as well as the administrator of the estate. As a result, the court of appeals found that Powell could state a claim against the attorneys bringing a wrongful death action for which he was a beneficiary, notwithstanding the fact that he lacked a direct attorney-client relationship with the Law Firm.

Risk Management Solution: State laws vary as to whether or when attorneys owe duties to third party beneficiaries of their services. As a result, it is important to carefully check the language of any applicable statute or governing case law to determine if duties exist to the beneficiaries of the estate, and not simply the testator or the personal representative that hired the attorney to prosecute the action on behalf of the estate. Attorneys representing estates should be cognizant of the fact that they may owe duties to the beneficiaries.

Attorneys may need to identify parties who require a guardian (like Powell), and who may require separate counsel to determine whether their interests are being served in any settlement, given the potential conflict that may arise between the lawyer's client and the beneficiary. If multiple parties are to be jointly represented, it will be essential to identify and explain the rules governing conflicts of interest and the duties of confidentiality in these situations, and to obtain the appropriate waivers. If conflicts later develop between the jointly represented parties on substantive issues, counsel may need to be obtained to represent their divergent interests.

Liability for Misstatements to Clients; Failure to Keep Clients Informed of Status of Case

Encinias v. Whitener Law Firm, P.A. et al., 310 P.3d 611 (N.M. 2013)

Risk Management Issue: What are lawyers' duties to inform the client that the statute of limitations has expired, or to make truthful statements as to the status of the case, where the underlying case has no actual merit?

The Case: The plaintiff client, a minor high school student, alleged that he suffered severe internal injuries when, in September 2004, a classmate attacked him outside of the high school property. Although this incident did not occur on property owned by the high school, the school had cordoned off the location so that students could patronize food vendors in the area.

In January 2006, the client and his parents retained the defendant law firm to file a lawsuit against the high school and the school district under New Mexico's Tort Claims Act. In April 2006, the client contacted the law firm and asked about the status of the case. The law firm requested that the client re-submit his paperwork. The plaintiff would later allege that the law firm had actually lost the original paperwork, and that the firm had not done any work on the client's case since it was retained three months earlier.

In the fall of 2006, the client again contacted the law firm because he was concerned that the applicable two-year statute of limitations would expire. However, when the client contacted the firm, the statute of limitations had already expired. In August 2007, nearly one year after the client had expressed concerns about the statute of limitations, the firm realized that the client's case was indeed barred by the statute of limitations. In February 2008, the law firm told the client that it decided not to pursue the client's case. The law firm did not inform the client that it (the law firm) had missed the statute of limitations until the spring of 2008.

In October 2008, the client filed a lawsuit against the firm for legal malpractice and misrepresentation. The district court granted summary judgment in favor of the law firm, concluding that New Mexico's Tort Claims Act did not waive the school's sovereign immunity, and the case would have been barred regardless of whether the lawsuit was timely filed. As to the misrepresentation claim, the court concluded that the plaintiff could not establish damages as a result of the law firm's misconduct.

The New Mexico Court of Appeals affirmed the district court's summary judgment decision. The Supreme Court of New Mexico then granted certiorari and considered the summary judgment decision on both the legal malpractice claim and the misrepresentation claim. As to the legal malpractice claim, the court acknowledged that the state – including the school district – is generally immune from tort suits. However, it also noted an exception to the state's immunity when damage is caused by the negligence of a public employee while the employee is acting in the scope of his duties in operating or maintaining buildings, parks, machinery, equipment or furnishings. Under this exception, the court overturned the summary judgment decision because the client had established a genuine issue of material fact as to whether there was a dangerous condition at the location of the beating. Because there was evidence that the area was a "hot zone" for student violence, and school officials had been aware of this, a question of fact existed as to whether the defendant was entitled to rely on a sovereign immunity defense.

The court also overturned the summary judgment decision as to the client's misrepresentation claim. The client's misrepresentation claim was based in part on the law firm's failure to inform the client when it became clear that the statute of limitations had passed. The problem with the misrepresentation claim was that the client did not allege any damages other than the loss of the underlying lawsuit. The lower courts reasoned that even if the law firm had informed the client that the statute of limitations had expired in the summer of 2007, the suit would still have been barred (assuming that the sovereign immunity defense immunized the defendant from liability). In those circumstances, compensatory damages resulting from loss of the underlying lawsuit would not have been available under a misrepresentation theory. The Supreme Court determined, however, that nominal and punitive damages were available for intentional torts. Therefore the client could pursue a claim for these types of damages in a fraudulent misrepresentation claim notwithstanding the lack of compensatory damages. In overturning the summary judgment decision dismissing those claims, the Court stated that if the law firm knowingly or recklessly led the client to believe his claim was still viable after the statute of limitations had passed, then the client might be entitled to nominal or punitive damages and, therefore, could state a claim under the misrepresentation theory as well.

Comment: The misrepresentation theory in this case was based upon an omission by the attorneys when they had a duty to speak. Although Rule 1.4 of the Model Rules of Professional Conduct ("RPC's") was not cited in this decision, that rule establishes an attorney's ethical duty to communicate with her client and provides that a lawyer shall keep the client reasonably informed about the status of the matter, reasonably consult with the client about the means by which the client's objectives are to be accomplished, comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Risk Management Solution: Since a lack of timely communication with the client is the basis for this claim for misrepresentation, the risk management solution is frequent communication with the client in accordance with RPC 1.4. A lawyer or law firm should also have in place a calendaring system that enables the lawyer to determine all deadlines applicable to a representation and to meet them. Finally, the lawyer should implement a practice management system that requires the lawyer to provide frequent updates to the client regarding the progress of the case. With appropriate calendaring and practice management systems, lawyers should have adequate safeguards in place to avoid the kinds of errors that occurred in this case.

Law Firm Websites – Regulation of Privacy Policies

Assembly Bill 370, Amending the California Online Privacy Protection Act of 2003

Risk Management Issue: What are law firms' duties in order for their websites to comply with the new amendment to the California Online Privacy Protection Act?

The Amendment to the California Statute:

California's Online Privacy Protection Act ("CalOPPA") requires owners of commercial websites and online service providers, referred to as "operators," to conspicuously post a privacy policy for the benefit of California consumers and to comply with that policy. CalOPPA applies to any website operators, including law firms who operate websites, which collect

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personally identifiable information ("PII"). The posted privacy policy must provide notice to California consumers regarding each of the categories of PII the operator collects and with whom the operator shares that information.

CalOPPA defines PII as "individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form." PII may include a person's (1) first and last name; (2) home or other physical address, including street name or name of a city or town; (3) e-mail address; (4) telephone number; (5) social security number; or (6) any other identifier that permits the physical or online contacting of a specific individual. PII also includes any other information concerning a consumer that the operator collects online from the consumer and maintains in personally identifiable form.

CalOPPA was amended on September 27, 2013, via Assembly Bill 370, to require operators to disclose how they respond to "Do Not Track" ("DNT") signals, effective January 1, 2014. DNT signals are options that consumers can choose on their web browsers which tell operators that they do not wish to have their actions monitored online through the collection of PII. With this amendment, California is the first state to attempt to address the national "Do Not Track" policy proposals which have been made by the Federal Trade Commission.

California requires operators within CalOPPA's ambit to disclose:

1) how the operator responds to Web browser "do not track" signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across third-party Web sites or online services, if the operator engages in that collection (California Business & Professions Code 22575(b)(5)), and

2) whether other parties may collect personally identifiable information about an individual consumer's online activities over time and across different Web sites when a consumer uses the operator's Web site or service. (California Business & Professions Code 22575(b)(6)).

Accordingly, the statute requires law firms to disclose in a privacy policy whether or not the firm itself or a third party collects PII from users. If PII is collected, the firm must explain in the privacy policy how exactly the law firm responds to DNT signals from users. Violators will be given notice of deficiencies by the California Attorney General. They will have 30 days to correct violations. Penalties thereafter are $2,500 per violation.

Risk Management Solution: The Amendment does not define "Do-Not-Track" or "other mechanisms," and there is no standard definition for these phrases in existence to date. This lack of clarity creates difficulties in compliance for all operators, including law firms. Until there is some clarification, law firms would be prudent to adopt a broad definition of the phrases "Do-Not-Track" and "other mechanisms." Law firms serving California based clients should disclose all actual practices in regards to their collection of PII and response to DNT signals in their privacy policies.

It is important to note that the amendment imposes only a disclosure requirement, which depends on how the operator collects information. Law firms serving California based clients need to examine their online services to determine how they respond to DNT signals and also to determine whether third parties are conducting tracking activities on their online services. If a law firm does not respond to DNT signals and no third parties are conducting tracking activities, simple disclosure of this fact in its privacy policy is sufficient to meet the requirements of the amendment to this statute. If a law firm serving California based clients does respond to DNT signals or permits third parties to conduct tracking activities, then it must disclose in its privacy policy how it responds to these signals. The amendment also expressly permits an operator to satisfy the requirements of section (b)(5) by information set forth in a separate online location accessible via a clear and conspicuous hyperlink in the operator's privacy policy.