Halloween Issue
October 2014

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

TRICK OR TREAT!

The editors of the Halloween edition of the *Lawyers' Lawyer Newsletter* invite you to enjoy frightening tales of lawyer liability following the death of lawyer; the settlement of a wrongful death case gone awry; and a doctrine (the unfinished business rule) which, like the undead, won't be put to rest. We hope these horror stories will delight and frighten just in time for All Hallows' Eve.

Trick or Treat Editor's Note: This case is definitely a trick for lawyers who do not have succession plans in place to deal with death or incapacity. Not even the lawyer's death could help him avoid a legal malpractice claim.

Attorney's Death Just Before Statute of Limitations Expired Does Not Preclude Legal Malpractice Action

***Cabrera v. Collazo,* 115 A.D.3d 147, 979 N.Y.S. 2d 326 (1st Dep't 2014)**

Risk Management Issue: What duties are owed to clients when an attorney is aware (or ought to be aware) that his or her medical condition (or potential death) may limit the lawyer's ability to accomplish his or her client's objectives on a timely basis?

The Case: This case involves a legal malpractice action brought by plaintiff Milagros Cabrera against defendants Shelley B. Levy, as executor of the estate of Cary M. Tanzman, Esq., and the Law Office of Cary M. Tanzman (collectively, the Tanzman defendants) and Salvador Collazo, who participated in plaintiff's representation. The Tanzman defendants brought a pre-answer motion to dismiss the complaint for failure to state a cause of action based on documentary evidence, particularly Cary Tanzman's death certificate.

The premise of the defense was that because Tanzman's death on October 24, 2010 terminated the attorney-client relationship, Tanzman and his law firm could not be held liable for any damages that plaintiff sustained due to the subsequent running of the statutory limitations period on November 4, 2010.

On November 4, 2008, Raquel Gutierrez died as a result of negligent care and treatment that was rendered by her doctors and nurses. Attorney Salvador Collazo was retained by decedent's brother, Porfilio Gutierrez, to commence a wrongful death action against the allegedly negligent individuals. It was not clear what work, if any, Collazo performed in the course of his representation. On March 11, 2010, Milagros Cabrera entered into a retainer agreement with the Tanzman law office, which included a fee-sharing provision stating that while Collazo would not be actively participating in the litigation, he "shall be participating in contacts between the Law Office of Cary M. Tanzman and the client."

On or around April 16, 2010, Collazo was convicted of immigration and visa fraud in the U.S. District Court for the Southern District of New York. He was sentenced to 24 months' imprisonment on October 14, 2010.

In late September, Tanzman filed a certificate of lateness with the surrogate's court stating that "another attorney" had been contacted initially by the family and "did nothing on the file for over a year." It was followed by a letter of September 30, 2010 asking that letters of administration be issued "as soon as is possible because there was a wrongful death matter associated with the above-named decedent and the Statute of Limitations will be expiring shortly." The surrogate's court issued letters of limited administration on October 6.

On October 24, 2010, Tanzman died at Memorial Sloan-Kettering Cancer Center. The statute of limitations on plaintiff's wrongful death action expired on November 4. No complaint was ever filed on plaintiff's behalf, and this action for professional malpractice ensued.

Attorney's Death Just Before Statute of Limitations Expired Does Not Preclude Legal Malpractice Action, continued on page 2

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The Tanzman defendants argued that neglect of a client matter by an attorney is not actionable if, as here, the attorney dies before the applicable limitations period runs against the client.

The court noted that the extent of the duty imposed on the attorney to commence a timely action depends on the immediacy of the running of the statutory period, and no duty will be imposed where sufficient time remains for successor counsel to act to protect the client's interests in pursuing a claim. Where, as here, the expiration of the statute of limitations was imminent and the possibility that another attorney might be engaged to commence a timely action was foreclosed, there was a duty to take action to protect the client's rights.

Other than the certificate of death, defendants offered no evidence to elaborate on the cause or circumstances surrounding Tanzman's death. However, the record suggested that plaintiff had cancer, and that his death may have been foreseeable, and plaintiff was entitled to the inference that Tanzman died as a result of a chronic, terminal illness that he knew, or should have known, presented the immediate risk that his ability to represent his clients' interests might be impaired.

The record also reflected that Tanzman knew Collazo could not be relied upon to assist with plaintiff's representation. According to Tanzman's own statement, Collazo had done nothing on the matter in over a year, and Tanzman's retainer agreement assigned Collazo only a limited role in the case. Further, Collazo had been convicted on a federal criminal offense and was facing sentencing and disbarment. Tanzman was aware of the need to prepare and file a complaint or to arrange for one to be filed as soon as the necessary letters of administration were received. Tanzman neither filed a complaint nor engaged another attorney to file one in his stead despite the availability of three attorneys associated with the firm as of counsel.

The court rejected the Tanzman defendants' claim that the attorney-client relationship ended with Tanzman's death. Absent evidence that the onset of Tanzman's final episode of illness was sudden, unanticipated and completely debilitating, the court noted, the failure to seek assistance with the filing of a timely complaint represented a failure to protect plaintiff's interests. Further, plaintiff was not informed that the statute of limitations was about to expire so that she could protect her claim. But even if plaintiff had been put on notice to engage another attorney to initiate the wrongful death action, no means were identified by which the case file might have been obtained from the Tanzman firm to permit substitute counsel to file a timely complaint. In short, while the statute of limitations had not yet run at the time of Tanzman's death, nothing in the record suggested that there was any available means by which plaintiff might have preserved her wrongful death action. At the time of Tanzman's death, the running of the statute of limitations against his client was a foregone conclusion because intervention by substitute counsel was not possible. Accordingly, the denial of the Tanzman defendants' motion to dismiss the claim of legal malpractice was affirmed.

Risk Management Solution: The questions of whether *Cabrera* establishes an affirmative duty to disclose the attorneys' diagnosis of a terminal illness to a client or to advise the client with respect to the running of the statute of limitations or otherwise were left open by the court. Instead, *Cabrera* stands for the proposition that where the expiration of the statute of limitations is imminent and the possibility that another attorney might be engaged to commence a timely action is foreclosed, there is a duty to take action to protect the client's rights and that duty persists as against the attorney's estate and his law firm even — or perhaps especially — if the attorney dies without having made such arrangements.

Cabrera underscores the need for attorneys and law firms to have a succession plan in place in the event of an attorney's death to handle the lawyer's files post-death. This plan should include, at a minimum, a system by which the attorney's files are immediately reviewed for imminent deadlines and a plan to act timely as required.

Trick or Treat Editor's Note: Efforts to expand the scope of an attorney's duties to non-clients is certainly a trick. So, watch out!

Attorney Duties of Care to Third Parties

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

Risk Management Issue: What duties do lawyers have to protect the interests of an estate's third-party (non-client) beneficiaries, when representing the estate in a wrongful death action against other 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 (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 (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 (second 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 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 were not being expended toward his care. In 2009, the probate court entered an order removing Leona as Powell's guardian of his person 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 Powell's estate. 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 Powell's interest 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.

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 had 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, while wrongful death actions are brought in the name of the decedent's personal representative, unless otherwise provide, 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, it held that because the next of kin were the intended beneficiaries of a wrongful death cause of action, the attorneys litigating that case owed a duty of care to the next of kin, as well as to the administrator of the estate. As a result, the court 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 who hired the lawyer 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.

Trick or Treat Editor's Note: Cases involving the unfinished business rule continue to provide both tricks and treats to lawyers following this issue. This case provides another example of risks associated with receiving unfinished business — a definite trick for such firms.

The Unfinished Business Rule — the Saga Continues

***In re Howrey LLP,* 2014 WL 4435982 (N.D. Cal. Sept. 9, 2014)**

Risk Management Issue: What is the status of the unfinished business rule and how should firms deal with the risks while the uncertainty continues?

The case: The U.S. District Court for the Northern District of California has again taken up the unfinished business rule, this time dealing with the dissolution of Howrey LLP. The trustee for the bankruptcy estate for Howrey, relying upon *Jewel v. Boxer*,(156 Cal. App. 3d 171 (1984), filed multiple complaints for avoidance and recovery of alleged constructive fraudulent transfers against law firm defendants for the value of profits received by the firms for unfinished business previously handled by Howrey. The trustee sought to recover unfinished business profits from departing attorneys who left both before and after Howrey's dissolution.

Defendant law firms, relying on the prior recent decisions in California (*Heller*) and New York (*Thele*n), moved to dismiss the complaints. In those decisions, respectively, the courts had ruled that a defunct law firm could not recover profits generated by hourly rate matters brought by departing attorneys and that hourly fee matters are not "partnership property" within the meaning of California (*Helle*r) or New York (*Thele*n) law, respectively. Notwithstanding these decisions, the district court in *Howrey* denied the law firm defendants' motions to dismiss regarding the claims for the return of profits.

The court based its decision on the fact that neither California nor New York law applied to this case. Instead, it relied on a handful of cases from the District of Columbia, noting that those decisions had applied the unfinished business rule to hourly and contingency fee cases. The court ruled that because there has been no change to the law of the District of Columbia, the trustee's claims based upon the unfinished business rule would survive the motion to dismiss. This ruling applied to the business taken by partners both before and after Howrey's dissolution.

Comment: This case is the latest in a series of recent decisions involving the unfinished business rule, discussed in prior issues of the *Lawyer's Lawyer Newsletter*. *See*: Vol. 18, Issue 3, July 2013 (discussing *In re Heller Ehrman LLP*), Vol. 17, Issue 5, Nov. 2012 (discussing *Geron v. Robinson & Cole LLP*), and Vol. 17, Issue 3, Sept. 2012 (discussing *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP*).

Risk Management Solution: Just when it appeared that the courts were getting behind the idea that new firms could accept business from dissolving firms without having to pay back profits to bankruptcy trustees and creditors of the dissolved firms, *Howrey* throws uncertainty into the mix. The decision shows that law firms receiving the new business commenced at the newly hired lawyer's prior firm cannot yet be certain that they can avoid liability under this rule if the prior firm that dissolved was domiciled in, or its affairs were governed by, the law of a jurisdiction that has not (*or not yet*) actually decided the issue consistent with the *Heller* (California) and *Thelen* (New York) decisions. Additional uncertainty persists with respect to the California position, as we understand that *Heller* is on appeal to the U.S. Court of Appeals for the Ninth Circuit. As this case demonstrates, bankruptcy courts remain incentivized to find a way to push money back to these dissolved law firms' creditors.

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