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Wrongful Death Conflicts for Plaintiffs' Attorneys

By Thomas E. Simmons, Associate Professor, USD Law School

As adults, we learn that many of the fairy tales we heard as children have been redacted of their gore. Cinderella's step-sisters, in the original version, mutilated their own feet in squeezing them into the glass slipper that didn't belong to them. In the original Frog King, I'm told, it's not a kiss that breaks the spell, but a princess angrily flinging the frog against a wall. Ouch.

I'm here to tell you a couple of legal tales in their original un-sanitized state. They're not meant to frighten, but the nature of these kinds of stories is such that they may. Perhaps a bit of a scare will be to your own (and client's) advantage.

The first story is taken from *In re Estate of Powell*, 12 N.E.3d 14 (Ill. 2014). There, some plaintiff's personal injury lawyers brought a wrongful death claim against a decedent's physician. The decedent left behind a widow, Leona, a disabled child, Perry, and an older daughter, Emma.

The attorneys secured the wife's appointment as special administrator. Then, in 2005, a $365,000 settlement agreement was reached. After deducting costs, attorneys' fees, and a share for the widow, about $123,000 was allocated to Perry. The settlement was court approved and Perry's share deposited into an account titled jointly in his and mother's names.

Three years passed. Then, one day, Emma stopped by her mother's house and was dismayed at what she found. Her brother's hygiene and well-being seemed in jeopardy. Concerned that her mother was incapable of providing adequate care for Perry, she went to court and eventually secured the appointment of a conservator. The conservator soon discovered that Perry's settlement funds had been dissipated by his mother; just $26,000 remained in the account and Leona could not account for what the missing money. The conservator promptly filed a malpractice action against the plaintiff's firm.

The firm moved to dismiss the complaint, contending that it had never represented Perry. Since Perry had never been a client of the firm, his conservator could not pursue a claim for malpractice, they claimed. Technically, the firm was correct. Generally, an attorney owes duties to clients, not non-clients. But the court allowed the claim to proceed because the firm had been engaged to *benefit* (if not *represent*) Perry's interests as a wrongful death beneficiary. Where "a non-client is an intended third-party beneficiary of the relationship between the client and the attorney, the attorney's duty to the client may extend to the nonclient as well," the court explained. The claim that Leona's attorneys should have done more to protect Perry's funds from her could proceed.

Here's the second story, and it's taken from Restatement (Third) of the Law Governing Lawyers § 37 (2000). I've give you a spoiler alert (which I've just done), followed by the spoiler: This one ends with the lawyer disgorging all her fees.

Section 37 says, "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." The chief duty of lawyers to clients is the duty of unflagging loyalty. Stated another way, a lawyer must avoid conflicts of interest. By failing to, she risks fee forfeiture.

The plaintiff's firm in *Powell* had argued rather forcefully that the court should not allow nonclient Perry to complain of the firm's performance because of the can of worms it would open in terms of the duty of loyalty. They asserted (convincingly, I think) that if an attorney's duties are extended beyond the special administrator to the beneficiaries, unavoidable conflicts of interest would result. In the distribution phase of a wrongful death suit, there is no set fractional formula for dividing the funds (as there would with a survival claim). As a result, they explained, nearly every wrongful death case would involve conflicts of interest.

The court was unmoved. That issue "has no bearing on the case before us," it quipped. An appellate court should not decide "abstract questions," it then added. But the possibility of conflicts in a wrongful death case is hardly abstract. Because it is a conflict that can be reasonably anticipated (unless the plaintiff is zeroed), it stands to follow that it might only be avoidable by arranging for independent representation of each wrongful death beneficiary from day one – especially where some of the beneficiaries are minors or disabled.

Is there any comfort in Restatement section 37? "Forfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy, for example, when a conflict of interest arises during a representation because of the unexpected act of a client or third person," explains comment d. But the *Powell* court seems to have been unconcerned about the idea that the conflict here was structural and likely to recur with frequency.

Any plaintiff's attorney can anticipate the possibility of a conflict in allocating wrongful death proceeds among beneficiaries. And here's another possible conflict: What if Leona had asserted that she should be the custodian of her disabled

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child's recovery, not some corporate fiduciary? How can that conflict be resolved when Perry's disability precludes him from voicing his own views? These kinds of conflicts are foreseeable at the moment the client signs the contingent fee agreement; it is not a conflict that "arises during a representation because of the unexpected act of a client." This doesn't sound comforting at all.

You can probably see where I'm going with this: fee disgorgement as the icing on the cake of a malpractice claim. Then, of course, there's also the possibility of disciplinary sanction. Ouch.

The second sentence of section 37 explains, "Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." There's not much comfort here, either. And there's no malpractice policy that I've ever heard of that will reimburse the plaintiffs for lost attorneys' fees.

I think it's pretty clear why we've revised our fairy tales over time, leaving out the nasty bits. It's because they've evolved into bedtime stories. The originals don't function well as bedtime stories, Kids can't sleep after a gory description of a wolf being disemboweled to release Little Red and her grandmother. These two tales – *Powell* and Restatement section 37 – are not designed for bedtime stories, either. Then again, if they keep us awake at night, so much the better if by sleeplessness we can steer clear the real-life gore occasioned by missteps – for us and our clients, too.

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