Checklists

By CHARLES D. RAY

Checklists are wonderful things, especially when your life gets hectic and time is short. Going on vacation? Do we have our boarding passes? Are the doors all locked? Is the oven off? Having a routine (if not an actual list) can be a stress saver in many situations. And in the aftermath of the Supreme Court's decision in *Wisniewski v. Palermino*, 351 Conn. 390 (2025), attorneys would be well-advised to update their own routines and checklists.

In 2018, Edward Wisniewski asked Attorney Palermino to assist him with estate planning documents. Mr. Wisniewski owned a security account valued at over $845,000 and decided he wanted to divide that account, upon his death, in five equal shares to his daughter, three of his grandchildren, and a friend. Attorney Palermino prepared a will that provided for the five equal shares and Mr. Wisniewski died soon after the will was completed. The problem that divided the Supreme Court soon became apparent—Mr. Wisniewski's daughter was named as the sole beneficiary of the security account and ended up with all the money.

Two of the grandchildren and the friend sued Attorney Palermino, alleging: 1) professional negligence for failing to advise Mr. Wisniewski to make sure that his beneficiary designations complied with the wishes he expressed in his will; and 2) breach of contract for failing to draft the will in accordance with Mr. Wisniewski's wishes. The trial court dismissed the professional negligence claim for lack of standing, "reasoning that an attorney cannot be held liable to third-party beneficiaries of a will under Connecticut law, except for errors related to drafting or executing the will. The trial court eventually dismissed the plaintiffs' contract claim, resulting in an appeal to the Appellate Court, which the Supreme Court transferred to its own docket.

The case was originally argued to a panel consisting of Chief Justice Mullins and Justices McDonald, D'Auria, Ecker, Alexander, and Dannehy. Those six divided 3-3 on the outcome, so Judge Westbrook was added to the panel and became the deciding vote in reversing the judgment of the trial court, at least in terms of the professional negligence claim. The majority's decision was penned by Justice McDonald and joined by Justice Ecker, Justice Dannehy, and Judge Westbrook.

Let's start with the general rule: "attorneys are not liable to persons other than their clients for the negligent rendering of services." As is the case with most general rules, however, this one has exceptions. Indeed, in *Stowe v. Smith*, 184 Conn. 194 (1981), the Court held that third-party beneficiaries could sue an attorney "for errors related to drafting, preparing, or executing a client's will." And then in *Krawczyk v. Stingle*, 208 Conn. 239 (1988), the Court rejected a claim of improper delay in preparing documents, but left open the possibility "that an attorney may still have a duty to third-party beneficiaries of a will if the balance of public policy considerations warranted imposing a duty." The *Krawczyk* Court identified five relevant factors: 1) whether the primary purpose of the transaction was to benefit the third party; 2) the foreseeability of harm to the intended beneficiaries; 3) the proximity of the injury to the conduct complained of; 4) the policy of preventing future harm; and 5) the burden on the legal profession is liability is imposed.

In *Wisniewski*, the plaintiffs argued that the attorney failed to meet the standard of care in two respects. First, by failing to tell Mr. Wisniewski that he should change the beneficiary designations on the security account to match those in his will. Second, by failing to ensure that Mr. Wisniewski actually made those changes. In response, the defendant argued that imposing either of the duties alleged by the plaintiffs would violate the long-standing notion that an attorney owes a duty only to his client, interfere with the attorney-client relationship, increase litigation and legal costs, and run counter to rulings in other jurisdictions. In short, Attorney Palermino argued that he prepared Mr. Wisniewski's will exactly as he was asked to and, under existing law, that should be the end of the case.

Applying the *Krawczyk* factors, the majority concluded that: 1) the primary purpose of the transaction was to benefit the third-party beneficiaries of the will; 2) it was foreseeable that the plaintiffs would be injured by the defendant's failure to advise Mr. Wisniewski to change the beneficiary designation on his security account; 3) this may be a case where the interests of the beneficiaries loom larger than those of the client; 4) denying liability in this situation would deprive the client of his wishes and deny the intended beneficiaries any recourse for their losses; and 5) imposing liability in this situation would not unfairly burden the legal profession.

The dissenters - Chief Justice Mullins and Justices Alexander and D'Auria - take up the case of the defendant attorney. For them, the overriding principle is the central tenet of the attorney-client relationship. Namely, "the attorney's duty of [e]ntire devotion to the interest of the client." Recognizing the previously approved narrow exceptions to this rule, for errors in drafting or executing a will, the dissenters "would not go any further."

As to specifics, the dissent disagreed with the notion that the primary purpose of the attorney-client relationship was to benefit the plaintiff's beneficiaries. In this regard, the allegations of the complaint became important, with the dissent noting that "the complaint does not contain allegations establishing the significance of the [security] account relative to the decedent's other assets, if any." Setting aside the particulars of the complaint, however, the dissent's "primary concern" was "the impact of the majority's decision on the attorney-client relationship and the burden on the legal profession that will result."

Focusing on the sanctity of the attorney-client relationship, the dissent takes the view that unlike drafting or execution mistakes that are plain to see, imposing liability in this situation will require courts, juries, and parties to "invade the attorney-client relationship and to reveal confidential and privileged communication." The dissent envisions a case in which an attorney is sued by a disappointed third-party beneficiary and is unable to rely on his or her deceased client for supporting testimony. Even if the attorney were to prevail at trial, the action would require the attorney to "bear the costs of litigation and to divulge all the confidential and privileged communications between the attorney and client." For the dissent, these costs are too high. And if liability is imposed in this situation, "attorneys may become distracted by concerns about this liability and lose the proper focus on the client's interests."

In sorting through all of this, it is important to note that the majority adopts its new rule of liability in a very fact specific situation—a failure to advise a client that they need to make sure that their beneficiary designations match up with what they want to put in their will. The majority specifically rejected the plaintiffs' claim that an attorney has an obligation to ensure that the proper designations have been made, so we may never see the problems envisioned by the dissent come to fruition. In other words, is this an exception in name only and one that may never apply again? Or is this the first step on a path that will allow the exceptions to swallow the general rule? We will likely find out in the future. In the meantime, polish up those checklists! ■

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