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Duty to Client in Business Deals Murky, Attorneys Say

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A New Jersey appeals court's September 2014 holding that lawyers must thoroughly counsel even sophisticated clients on deal-making will remain the law going forward since the state Supreme Court declined last month to hear the case—and transactional attorneys say they've taken heed.

The case is *Cottone v. Fox Rothschild*, in which the Appellate Division found a duty, as a matter of law, to explain contract terms, even if they're unambiguous and the client personally negotiated them. In the process, the court reinstated a legal malpractice suit against Fox Rothschild, which is now on remand.

"It is a concern for transactional attorneys," said Philip Forlenza, a partner in the corporate and business practice at Giordano, Halleran & Ciesla in Red Bank, N.J., and chair of the New Jersey

State Bar Association's business law section. "Are they now required to explain even the most fundamental aspect of it?

"To me, what this case represents is a possible need to go farther in establishing a record," and it "at least suggests that you may have a greater duty," he added.

W. Raymond Felton, who chairs the corporate department at Greenbaum, Rowe, Smith & Davis and is comanaging partner of the Woodbridge, N.J.,firm, agreed that "you certainly need to be aware" of *Cottone*.

"When you drill down to it, you run into some tricky questions," Felton said.

One issue: document discussions with clients are often oral.

"You don't necessarily create a written record of what was said or not said," Felton said. "Probably it's best if possible to confirm in an email what was said … to verify the deal is what the client thinks it is."

Another question is "just how much an attorney should or could realistically get into," Felton said. A choice-of-law analysis, for example, theoretically could go on ad infinitum.

"Something that makes me very nervous doing this sort of work is when the client hasn't read the agreement and is relying on the attorney to determine whether what is in the client's mind is in the agreement," Felton added. "It does happen, and it does happen with significant transactions."

Familiarity, in these cases, can breed informality, and not every deal is created equal. Clients demand different levels of review for the routine, such as a revised distribution contract, versus the rare, such as an asset sale, lawyers said.

Felton added, "There are deals that are what I'll call 'on the fly.' … Sometimes there's good business reasons for that; sometimes it's impatience."

According to Forlenza, "Often, your clients are recurring clients who send over agreements for you to look at, and you're not negotiating the terms of the agreement. ... In the real world, these kind of reviews and consultations are done under a very tight time frame."

He added, "If it's a clear, unambiguous term, you could make the argument that even an unsophisticated person doesn't always need an explanation. It's a judgment call."

But according to Bennett Wasserman of Davis, Saperstein & Salomon in Teaneck, N.J., the attorney's judgment about the client's know-how should be less a part of the equation.

Wasserman, who represents malpractice plaintiffs and is vice president of consultancy legalmalpractice.com, said "one of the best ways to avoid liability is to err on the side of giving too much information.

"It's not for the lawyer to judge how sophisticated his client is," Wasserman added. "Because in many ways, by doing that, we do the client a disservice."

Wasserman cited Rule of Professional Conduct 1:4, Subsection (c), which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

One protective measure, he said, is for the lawyer to limit the scope of the representation through a "*Laufer* letter."

The term refers to attorney William Laufer, whose use of a limiting letter, albeit in a family case, was approved in 2003 by an appellate panel in *Lerner v. Laufer*. There, a three-judge panel ruled that the letter shielded Laufer from malpractice liability premised on his failure to look beyond the face of a mediated property settlement agreement to determine if it gave his client a fair share of the marital assets.

"The defendant in [*Cottone*] would've won on summary judgment if he presented a letter," Wasserman said. "The purpose of an engagement letter is not only to set out what the lawyer is supposed to do, but what the client is supposed to do."

Another transactional lawyer, Edward Stevenson, was less convinced of *Cottone*'s significance of, at least for now.

"What that duty requires isn't clear," said Stevenson, who cochairs the corporate department at New York-based Herrick Feinstein and works in the firm's Newark office. "We need to wait to determine the outcome in the trial court as to whether there was a breach of the duty of care. I don't believe that there will necessarily be any bright-line rules that will come out of this case. Because as the appellate court has said, it is a fact-sensitive issue that has to be resolved."

Each lawyer agreed that these questions arise against the backdrop of intense rate pressure, and *Cottone* at least serves as a reminder that a successful client engagement hinges on setting reasonable expectations.

Felton joked that clients today have just three requirements: Reduce the agreement to one sheet of paper, finish it in one day and—last but not least—protect against every potential problem.

"That's pretty much our standing order," Felton said. "It's a nice trick if you can pull it off, but unfortunately it's not the real world."

The agreement at issue in *Cottone* was meant to resolve a 2009 lawsuit by plaintiff Robert Cottone against NIA Group, which had bought his commercial insurance brokerage in 2000. As part of the purchase, Cottone had equity in NIA, according to the appeals court's opinion.

NIA, which was in the process of being acquired by Marsh & McLennan when the 2009 dispute arose, offered to buy out Cottone's equity interest if he dropped the lawsuit, and pay a "kicker" or "bump" if the sale went through within six months of the settlement, the opinion said.

Cottone claimed Fox Rothschild partner Eric Michaels—who was reviewing the agreement as Cottone negotiated it—failed to alert him that language inserted at the 11th hour by the other side took away the kicker, according to the opinion.

The final agreement was signed in October 2009, and Marsh & McLennan bought NIA two months later. When Cottone realized he was not being paid the kicker, he called Michaels to ask what happened, the opinion said.

Whether the two discussed that provision is in dispute. According to Cottone, Michaels admitted missing that language in the final version. Michaels denied making any such admission and claimed to be merely a "'scrivener'" for Cottone, according to the opinion.

In the malpractice action against Fox Rothschild and Michaels, Superior Court Judge Kenneth Slomienski granted the defendants' motion for summary judgment, saying Michaels had no duty to explain unambiguous terms. He noted that the last-minute language was not "hidden away," and there was no evidence that Cottone told Michaels what he wanted reviewed.

"We cannot insure or protect a client from something which is not made known to the attorney," Slomienski said.

But Appellate Division Judges Victor Ashrafi, Jerome St. John and George Leone reversed on Sept. 2, saying "there is no question that defendants owed plaintiff a duty of care arising from the attorney-client relationship."

They agreed that the contract language was unambiguous but said "the real question … is whether Michaels committed malpractice by not inquiring into or explaining the terms of the redemption agreement, that is, whether a competent and diligent attorney acting in similar circumstances would have done so."

On remand, there's no conference date as yet, but additional briefing could be coming, according to Cottone's lawyer, Robert McAndrew, who heads a Morristown, N.J., firm.

"Now that it's back in the trial court, we need to sit back, relax and let everybody take a deep breath," McAndrew said. "I certainly would welcome any invitation to sit down and resolve it, but it hasn't happened yet."

The Appellate Division, in its ruling, "basically provided us with a primer on all of the law," McAndrew said, adding that the transactional lawyer's duty of care has "been well-settled … in many other cases."

Fox Rothschild's lawyer, Brian Molloy of Wilentz, Goldman & Spitzer in Woodbridge, N.J., didn't return a call seeking comment.

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