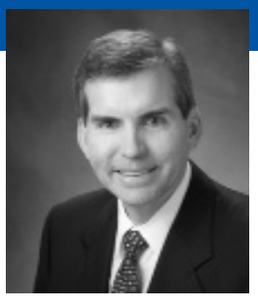
Does a Lawyer Owe a Duty to Explain Unambiguous Language to a Sophisticated Client?

Avoiding Liability



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A recent New Jersey case raises the issue of "whether … an attorney owes no duty, as a matter of law, to explain unambiguous business terms in a written agreement when the client is a sophisticated businessperson who negotiated the terms of the agreement himself." *Cottone v. Fox Rothschild*, 2014 N.J. Super. Unpub. LEXIS 2143 at *1. The court's short answer is "no" as a matter of law but maybe "yes" as a matter of fact.

In *Cottone,* the client contended that his attorney should have alerted him to the existence of language in the agreement added by the other party, which both the motions court judge and a unanimous three-judge panel of the New Jersey Superior Court Appellate Division considered unambiguous. The motions court judge also found that this language was not "hidden away." The client claimed that he would not have gone ahead with the deal if he had been aware of the existence of this language in the agreement. The motions court judge had granted summary judgment for the defense, finding, among other things, that the client had failed to make a prima facie case on proximate causation. The court noted the absence of any "evidence that [the client] told [the lawyer] what he wanted or 'a list of the points' to look for in the agreement," concluding that "[w]e cannot insure or protect a client from something which is not made known to the attorney." That court also rejected the existence of any "general duty of care to his client[,]" concluding that not to do so "would 'open the floodgates' for malpractice litigation." Instead, it held as a matter of law that the lawyer, in the instance of a sophisticated client, "owed no duty to plaintiff to explain … unambiguous business terms."

That judge ignored or rejected an expert opinion on the plaintiff's behalf that, notwithstanding that the language was in plain English, the lawyer was negligent for his failures to notice it, call it to the client's attention and explain its consequences. The judge also rejected the defendant lawyer's contention that the defendant could not be blamed because his role was to act as a "mere scrivener … responsible only for ensuring that the written agreement reflected the terms negotiated by [client]." To the contrary, in the view of the plaintiff's expert, the lawyer was negligent for his failure "to 'fully discuss the matter' with [the] plaintiff and to ensure that the … [agreement] 'accurately reflected the deal [that the plaintiff] believed he had made.' "

In a not-for-publication per curiam opinion, the appellate division reversed the entry of summary judgment and remanded the case for trial. The court disagreed with the contention of the defense and the lower court that whether the lawyer owed a duty under these circumstances was a question of law for the court. Instead, quoting case law, the court noted that, "[g]enerally speaking, a lawyer is required to exercise the 'degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise.' " It recognized that there are occasions where the client is sufficiently sophisticated to understand "aspects of a financial transaction … so as not to impose [an obligation] of their lawyer to explain the transaction in detail." But noting that expert testimony is required in most legal malpractice cases, the court was not convinced under the circumstances of this case that expert testimony was not required to establish the contours of the duty owed. Although "[t]he existence of a duty of care and the standards defining such a duty are legal questions determined by the court as a matter of law," the court contended that whether the lawyer has satisfied that duty becomes a factual question that is to be proven with expert testimony. It recognized that summary judgment for the defendant lawyer would still be possible if there were insufficient evidence to prove the material facts upon which the plaintiff's expert witness based his opinion.

The court cited examples of disputed fact, none of which are germane to the issue of whether a lawyer owes a duty to a sophisticated client to explain language that is in plain English and not hidden from view. For example, the court noted that the parties disputed whether the oral agreement negotiated by the buyer included the provision in question. It also cited as a dispute whether the lawyer acknowledged that he "missed it," meaning that he had missed the provision in question in the agreement. Neither such dispute may have been relevant with respect to whether summary judgment should have been granted, but they beg the question of whether the lawyer was under a duty as a matter of law to explain the entire agreement to the client.

Cottone is not a declaration that a lawyer must always explain plainly worded agreements to sophisticated clients. Instead it finds that the fact-finder should be given the opportunity to judge the credibility of an expert witness who believes that under the circumstances of this case the lawyer should have fully explained the agreement and, presumably, also to judge the credibility of an expert who will testify to the contrary.

The lesson this case teaches is that a lawyer may not rely on being a "mere scrivener" of an agreement, even for a sophisticated client. The terms of an agreement must be reviewed and explained to the client in order to avoid taking the question to suit.