



Strategies to Manage Your Law Firm's Professional Liability Exposures

MSP L 05/08 "Confusion and Contracts Don't Mix"

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Confusion and Contracts Don't Mix

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Philadelphia's Commerce Court has ordered an attorney and her firm to pay \$6.6 million to a former client because a poorly written lease agreement cost the client millions of dollars in a wrongful eviction case (Shannon P. Duffy, "Attorney Hit With \$6.6 Million Malpractice Verdict," www.law.com, April 23, 2007).

The client, a real estate corporation, claimed that it asked the attorney to draft a lease that could be canceled if the leased property sold. However, when the corporation evicted the lessee from its property, the evicted party sued for wrongful eviction. The client was forced to settle the wrongful eviction case for \$4 million.

The judge in the eviction case declared that the lease agreement drafted by the attorney was "inartfully written and done so in a confusing fashion, which lends itself to ambiguities and disagreements."

After the settlement, the corporation filed a lawsuit against its former attorney. In the malpractice case, the court awarded the real estate client \$4 million to offset its loss, as well as over \$972,000 in attorney fees and \$1.6 million in interest.

Commentary and Checklist

The sobering verdict serves as a warning to attorneys of the ramifications of ambiguous contract drafting.

Leases and other standardized contracts should include language that has withstood scrutiny from courts, plaintiffs and their counsel over a period of time.

It is important that attorneys avoid "reinventing the wheel" and use form language that has a track record of success.

When a situation requires drafting unique language, a best practice is to borrow language from similar contracts and to have more experience attorneys review the language to make sure the wording is clear and concise.

Finally, it is always a best practice to have your client review and sign off on any new language as meeting its requirement. If your client understands the language without questions, so will any potential plaintiff.

In the above matter, the client claimed that the attorney did not include a cancellation provision in case of sale within the lease. Had the client reviewed the lease, it would have had an opportunity to catch the mistake; especially if the mistake resulted from poor communication.

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Confusion (continued from page 1)

Other important tips for contract drafting include:

- Provide an outline to your client of the provisions you plan to include in your contract.
- Organize your contract in a logical fashion using the outline.
- Begin your contracts with a preamble explaining the intent of the parties.
- Use headings to introduce new provisions.
- Avoid long sentences and endless paragraphs.
- If a provision has especially negative consequences to a party, consider having the party or both parties initial the provision.
- Use clear and concise language. Use of archaic language and redundant synonyms increases the likelihood that a court will find a contract ambiguous or unclear.

- Review case law dealing with similar issues to see if the courts have ruled on the effectiveness of the language in question.
- If utilizing boilerplate language, examine each clause to see if it is applicable to your situation. If not, revise it or eliminate it from the contract.
- Have an attorney in your firm who is unfamiliar with the situation review the contract.
- Once again, have the client read and approve the contract and go over the contract with the client prior to the closing. ✨

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Escrow Accounts and Hot Checks

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Dozens of Atlanta-area real estate closing attorneys received a shock when checks issued by HomeBanc Mortgage bounced in August 2007. Attorneys who had assumed the checks were good and completed closings found themselves personally responsible for the checks they had issued from their escrow accounts to sellers, real estate agents, surveyors, and others (Andy Peters, “Closing Attorneys see red after receiving bad checks from HomeBanc Mortgage,” www.dailyreportonline.com, August 16, 2007).



Attorneys estimate that HomeBanc may have issued \$20 million in bad checks on July 30 and 31 before filing for Chapter 11 bankruptcy protection on August 9. Although Georgia’s “good funds” law requires

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the checks clear the bank before funds are dispersed, it is a common practice for real estate attorneys to complete the closing as soon as they have a check in hand, according to C. Scott Logan, president of the Georgia Real Estate Closing Attorneys Association.

If the attorneys took steps to cover the checks they disbursed from escrow, they are not in violation of Georgia State Bar rules, according to State Bar General Counsel William P. Smith III.

Commentary and Checklist

The attorneys replaced the missing funds to stay in compliance with the Georgia State Bar's rule against negative balances in escrow funds, a rule designed to protect clients' funds.

The primary purpose of the negative balance rule is to protect clients from embezzlement of their funds. In this matter, the Georgia attorneys had no intent to embezzle client funds but were providing their clients a customary service; nevertheless, the rule still applied.

Here are some simple ways attorneys can prevent a similar situation when disbursing checks from their escrow account:

- Require wire transfers or cashier's checks to eliminate the possibility of bounced checks.
- If you accept a personal or company check, verify that the check has cleared before using those funds.
- Schedule closings to be at a time of day when the deposited funds can be verified.
- Require proof of a bond from home lenders that issue closing checks.
- Keep your finger on the economic viability of your lender.
- Exercise extra vigilance when dealing with unfamiliar lenders to be on the lookout for any unexpected red flags. ✨

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Disclaimer: Perspectives is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.

Employer Advisors Network

Managing Employment Law Exposures

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President of Employer Advisors Network, Inc.



Don Phin, Esq.

Managing the Emotions of an Employment Lawsuit

Few cases are as emotionally charged as those in the employment practices arena. It is a fact that most employers are well-intentioned, have no desire to discriminate, harass, retaliate for complaining, deny leave, or otherwise engage in inappropriate conduct. Nevertheless, they're getting sued for employment practices liabilities in ever-growing numbers, fueled in large part by unemployment rates hovering above 10%. (Think about it—we had 5% unemployment only two years ago.)

Here are some traps we can help our clients avoid and, in turn, reduce our own exposures.

Don't Practice Employment Law Unless You're an Expert

Employment law is a complicated area. For example, how familiar are you with what lawyers call the "Bermuda Triangle" — the interplay between FMLA, ADA, and workers compensation? If you're in California, that exposure expands and includes pregnancy disability laws and liability under FEHA.

Don't be tempted by your desire to help or to earn a buck. Associate with an experienced employment law counsel.

Get Your Clients to Audit Their Practices and Procedures

I'm amazed how clients are allowed to have out-of-date employee handbooks, or policies and procedures that are otherwise non-compliant. The formula for compliance is there, but their **attorneys** didn't insist they get their compliance act together.

Be sure to offer low-cost, easy to use, audit services which will identify your clients' exposures and lead to extra work for your firm. In the end, everyone wins.

Make Sure Your Clients Engage in Proper Compliance Training

Whether they pop in a DVD or hire you to do live training, there's no excuse for *not* doing it. The fact is that most managers receive little or no training in the compliance area.

Create a compliance quiz for managers to take, including their Human Resource executive, and it'll provide a real eye-opener for the business owners.

Manage Problems Quickly on the Front End

The moment your clients are put on notice of a potential claim, make sure to do a prompt and thorough investigation. If there is coverage, notify any EPL carrier under the policy "trigger" provision.

If you don't want to be excluded from any possible litigation, then have a third party do the work.

- Employees won 70% of employment law cases taken to trial in 2007
- The average verdict against employers in 2007 was \$270,000

Get Claims to Mediation or Arbitration

EPL cases are time-consuming, expensive, and emotionally draining. It is often better to get them over with than fighting to be "right."

Encouraging a client's defiant stance often backfires on the client and benefits only the lawyer. You can rest assured that if a hefty verdict is brought against a client, then that client's attorney will have a finger pointed at him or her for malpractice.

Whether it's through mediation, arbitration, or a settlement conference, try to get the matter resolved. If a case goes to trial, the odds are that the employer is going to lose. According to Jury Verdict Research, employees won 70% of the cases that were taken to trial in 2007 (the last year of available statistics). The average verdict was \$270,000.

If your fees weren't paid for by an insurance carrier and your clients receive such a verdict, you can believe that they will point fingers at you for malpractice — one of the many reasons why it's important to memorialize any settlement conversations between you and your clients.

If a case has to go to trial, you'd better make sure the only reason it did was because the opposing party was completely unreasonable and out of settlement

range. In a sense, you are forced to try the case. This is quite different than thinking you can "win it."

Consider Your Own Practices

It's a fact that law firms get sued for employment practices liability as much or more than anyone! Do you have your own house in order? Have you done your own policy updates, audits, quizzes, surveys, training, etc.?

If we wish to advise clients with our own integrity intact, then we need to follow this sound advice, too. ✨

Don Phin, Esq. is the President of the Employer Advisors Network, Inc.

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