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Alleged $636M Deal Error Highlights Ethics Considerations

By **Richard Leisner** (October 4, 2023, 4:33 PM EDT)

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Robert Adelman v. Proskauer Rose LLP presents an intriguing juxtaposition of facts and legal issues: A nationally prominent law firm accused of malpractice, allegedly arising from a cut-and-paste error resulting in potential damages of $636 million.[1]

In representing Adelman in a hedge fund reorganization, Proskauer allegedly included Section 3.2.5 in a key transaction document. Apparently, neither of the parties requested Section 3.2.5, and it was not the subject of negotiation.

After the closing, Adelman's co-founder Behzad Aghazadeh relied on Section 3.2.5 to undertake a series of transactions the completion of which would be extraordinarily disadvantageous to Adelman's economic interests.

Adelman sued Proskauer in the Suffolk County Superior Court of Massachusetts. In discovery, Proskauer produced a version of the agreement: The page with Section 3.2.5 included a handwritten comment featuring a single profane word opposite the section.

After the close of discovery, the court rejected the defendant's summary judgment motion in May. With trial scheduled for next year, the parties entered into a joint stipulation of dismissal with prejudice last week.

After reviewing pertinent details about the case, we **suggested in Part 1** that there are old-school deal documentation practices that today's deal lawyers might use to significantly reduce the likelihood of errors similar to those in the Proskauer litigation.

In this second part, we consider practical ethical considerations for transactions attorneys that the facts in this case highlight.

What To Do — And Not Do — When You Realize You Made a Mistake

We may never know how Section 3.2.5 or the marginal comment came into existence. The dismissal with prejudice provided no information in addition to the assertions in the plaintiff's summary judgment memorandum of law and the handwritten marginal comment. These are sufficient to provide a basis for additional lessons learned.

To consider these lessons, let us depart from facts of the Proskauer case and instead consider hypothetical facts to assist in our exposition of lessons learned.

Assume you are working on a transaction with complex deal documents. Before a definitive agreement is executed, you discover your firm's attorneys have made a serious drafting error that, depending on future events, may expose the client to exceptionally large financial liability. If future events work out for the client, there will be no losses.

Better document drafting would have avoided complete exposure to potential future loss. It is likely that a properly drawn liability protection provision would have been agreed to by the counterparty if it had been included in earlier drafts.

It is unlikely at this stage of negotiations that your client can achieve the desired business objective — without significant additional cost — if the client now seeks to remove or renegotiate the problematic provisions.

There are two courses of action. The first involves disclosing your drafting error to your client and renegotiating the deal terms as best you can for the client; there remains a good chance your client will achieve the desired business result but at a significantly higher cost.

Alternatively, you could decide not to tell the client about the drafting error and hope that the contingent adverse development never happens. Over the near term, your client will achieve its desired business result, and you will not have to tell the client about your firm's error.

If the contingency does occur and the client suffers substantial losses, your firm can sort out the issues at that time.

Do you proceed without disclosure, or do you share the truth with your client before proceeding?

A decision to disclose your error is mandated and supported by specific provisions of the Rules of Professional Conduct, applicable interpretations and case law.[2] ABA Formal Ethics Opinion 481 reads Rule 1.4 as imposing an affirmative duty on counsel to inform a current client of a material error.[3]

The opinion states that "an error is 'material' if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."[4]

This advice is consistent with and supported by the comments to Rule 1.4 regarding communications with clients about the status of representation, accomplishing client objectives and advising about possible client consent under Rule 1.7 for conflicts between clients and counsel and circumstances in which conflict waivers may be obtained.

What if it is possible to correct the error? Formal Opinion 481 allows counsel in certain circumstances to fix things before informing the client:

> When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.[5]

Notably, Formal Opinion 481 does not state that fixing an error absolves the attorney of the obligation to advise the client of the error — the general ethical obligation to keep the client reasonably informed about the status of representation remains applicable.

Further consideration of Formal Opinion 481 and its analysis and supporting authority are beyond the scope of this article. Suffice it to say that in our hypothetical scenario, counsel needs to disclose the error, fully inform the client about the potential future liability, and discuss with the client its options for continuing representation or engaging new counsel.

If the client wishes to continue with current counsel, the client's consent to waive this conflict with counsel must be informed, and the waived consent must be confirmed in writing. Being informed means the client needs to know the extent of current counsel's malpractice exposure explained by independent outside counsel.

Finally, current counsel has to conclude that, notwithstanding the conflict created by counsel's error, such counsel will be able to continue to provide effective counsel to the client.

The purpose of this lesson is fulfilled by an exposition of the hurdles faced by counsel in our hypothetical fact situation. Full speed ahead without disclosure of the error to the client is the wrong choice.

Avoiding Your Own Marginal Comment

The ethical underpinnings that direct you to advise clients when you make a material error are outlined above. Before you rush off to tell your client what went wrong, we conclude with recommendations for practical and ethical logistics to prepare for such disclosure.

Let us return to the hypothetical facts introduced above and the moment when you discover your error. If you are in an all-hands internal conference without your client, an exasperated senior partner may say to you, "You moron! What were you thinking when you drafted Section X.xx and sent it to the other side?"

Before you answer and certainly before you write anything in the margin of the deal document, excuse yourself and walk briskly to the office of your firm's general counsel. Don't send an email. Don't leave a voicemail. Don't write a sticky note.

As the Proskauer case indicates, when there is a prospect of client litigation against its counsel, many records are discoverable — even pencil notes that are double-underlined profanity.

I know some transactions lawyers pride themselves on retaining every marked paper draft generated during the pendency of a deal. While not saving "everything," other lawyers save some of their marked drafts and handwritten notes. This was my practice for many years.

The thinking here is that if post-closing inquiries are made, you can check your drafts and notes. You may believe these records will demonstrate the excellence of the deal lawyer's drafting skill, the deal lawyer's diligent efforts on the client's behalf and the inadequacies of the language submitted by the other side.

There may be some colorful comments here and there among the pages. But these are all internal drafts and subject to attorney-client confidentiality, right?

My deal lawyer friends may not have considered that there is always a possibility of post-closing litigation. On the day that litigation looms on the horizon, every piece of paper will become subject to a litigation hold and possible entry into the record of the case.

Of course, certain contemporaneously prepared deal records should be retained after closing. This includes anything emailed or delivered to the client or the counterparty and its advisers.

In my opinion, all those hand-marked paper drafts and personal notes need not be retained after closing. If there is no threat of litigation, and the deal is closed and cold, I suggest it is a better standard practice to destroy those paper drafts and internal notes. Post-closing housekeeping should include deleting internal drafts that were not distributed to the client or the other side.

The only deal history you need to know is that the parties, after negotiations and advice of counsel, executed the final documents.

In the event of litigation, how or why things wound up that way is unlikely to be proven by the marked paper drafts or handwritten notes retained by a deal lawyer after closing.

These materials would more likely be the source of confusion about parties' intentions and endless deposition questions. They may even wind up as part of the brief of counsel suing your firm for legal malpractice — or an appellate court opinion.

Tom Hanks, playing the manager of a women's professional baseball team in an insightful motion picture, famously observed to a tearful player, "There's no crying in baseball."[6]

I suggest that, in addition to the suggested changes in deal documentation practices noted above and in Part 1, Tom Hanks' maxim be extended with slight modification to the practice of deal law: "There's no profanity in deal documentation."

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[1] Adelman v. Proskauer , May 16, 2023, 2023 WL 3764934 (Mass. Super.).

[2] See also Florida Bar Rules of Professional Conduct (Chapt. 4), available on the Florida Bar website at https://www-media.floridabar.org/uploads/2023/06/Ch-4.pdf (last visited June 14, 2023); also available on Westlaw.

[3] Formal Opinion 481(April 17, 2018) A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_481.pdf (last visited June 14, 2023). See also Rules 1.4 and 1.7 Model Rules of Professional Conduct and comments (2023 Edition), American Bar Association.

[4] Formal Opinion 481, p. 4.

[5] Formal Opinion 481, p. 5.

[6] The Penny Marshall motion picture, "A League of Their Own," is a fictionalized story about the All-American Girls Professional Baseball League that began during World War II. The "no crying" clip is available on YouTube at There's No Crying in Baseball - A League of Their Own (5/8) Movie CLIP (1992) HD - YouTube, https://www.youtube.com/watch?v=6M8szlSa-8o, (last visited June 15, 2023).
