Placing form over substance

Freedman v. Brutzkus: *Opposing counsel cannot rely on attorney's approval as to form and content*

By Jonathan B. Cole, Michael McCarthy and Susan Baker

You have done it dozens of times in your legal career. You regularly sign off on agreements, stipulations, orders and settlements approving them as to form and content. But what does that mean? Are you making some sort of actionable representation? And if so, to whom? Some attorneys make it their policy only to approve documents as to form, possibly sensing the potential for trouble by addressing the content of an agreement. Others approve agreements as to both form and content, presuming their duties are limited to their clients.

The law lies somewhere in between. On one side of the spectrum, an attorney's duty of care does not extend to third parties with whom the client may deal. (See, e.g., *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601] [An attorney's duty to his or her client depends on the existence of an attorney-client relationship. If that relationship does not exist, the fiduciary duty to a client does not arise].) On the other end, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient. (See, e.g., *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 69 [131 Cal.Rptr.2d 777].) Just like a layperson, if a lawyer speaks or volunteers information, he is obligated to tell the truth. (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 201, 211 [227 Cal.Rptr. 887].)

A question of representation

But what constitutes a statement or a representation? In *Gary A. Freedman v. Mark Brutzkus*, a case of first impression in California, the Second District Court of Appeal recently decided that whatever else it may stand for, an attorney's approval of an agreement between his or her client and a third party as to form and content is not an actionable representation of any kind to the other party's counsel.

Los Angeles attorney Gary A. Freedman served as outside counsel for Teddi of California, Inc. (Teddi), an apparel manufacturer. Freedman also provided legal services to Carol Anderson, Inc (CAI). In June 2002, Freedman allegedly brokered a deal between his two clients whereby Teddi would license the Carol Anderson name and trademark. Freedman contended that he told CAI's agents that he would withdraw if they were uncomfortable with his joint representation of CAI and Teddi in the transaction, but no objection was raised.

Freedman allegedly continued to represent both sides of the transaction during negotiations over the next three months. The final agreement recited that Freedman represented only the interests of Teddi in the transaction with the consent of CAI, and that all conflicts of interest related to Freedman's previous representation were waived. The agreement also contained an integration clause that specified that no agreements, statements, or promises between the parties not contained in the agreement were valid or binding. Attorney Mark Brutzkus was retained to represent CAI while the deal was documented. The final signed agreement included a signature block signed by Freedman and Brutzkus, Approved as to Form and Content.

A dispute later arose between CAI and Teddi and CAI filed suit, forcing Teddi into bankruptcy. CAI then sued Freedman, claiming he had represented CAI in the negotiations leading up to the agreement and that he had told CAI that Teddi had the ability to pay the amount due under the agreement. During the course of the litigation Freedman deposed Brutzkus, who testified after the attorney-client privilege was waived that CAI had told him that, during the negotiations, CAI had relied on Freedman and their long-standing professional relationship. After Freedman filed several motions seeking dismissal of CAI's action, his malpractice insurance carrier settled with CAI prior to trial.

Freedman then sued Brutzkus for fraud, alleging that by approving the agreement as to form and content, Brutzkus made an actionable representation to Freedman, the attorney for the other party, as to the accuracy of the agreement.

Defining "approval as to form and content"

It is settled that an attorney cannot approve an agreement or give a legal opinion on behalf of an opposing party. (See, *B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 839). To find otherwise would upend the meaning of a common legal practice and potentially interfere with the attorney's absolute duty of loyalty to their own clients. (See, *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*

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(1994) 30 Cal.App.4th 1373, 1383-1384 [36 Cal.Rptr.2d 424] [Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved].) Nonetheless, the question of what the attorney's approval of an agreement as to form and content means had never been addressed by a California court.

The California Court of Appeal for the Second District determined that the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties. It is not an actionable representation to the attorney for the opposing party.

Cole

McCarthy

Baker

The court stopped short of finding that the recital is not a representation to the opposing party, however, declining to decide the unpresented question of whether Freedman's client would have a cause of action against Brutzkus. Although made in dicta, the court's warning sounds just as loudly: exercise caution when communicating with the opposing party in any setting.

Freedman is a fraud action and is factually unique, but representations giving rise to tort liability may lurk in the most unlikely of places.

Jonathan B. Cole, Michael McCarthy, and Susan Baker are attorneys with the firm of Nemecek & Cole, Los Angeles. The firm specializes in matters of professional malpractice.

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