

Risk Management for The Lawyer-Scrivener

More and more, clients are coming to lawyers with “completed” deals, seeking only for the lawyer to translate the negotiated agreement to paper to seal the transaction. The risks presented by these “scrivener” situations are real and fraught with the potential for misunderstanding, expectation gaps and accusations of incomplete performance or conflicts. As such, it is important to treat scrivener assignments with caution and an eye toward risk management.

Drafting a contract or other document you did not negotiate creates the potential for incompleteness and inaccuracy. Because you didn’t participate in the negotiation, you likely don’t have a good “feel” for what each party was agreeing to. And rarely are the clients able to describe the agreement or their relationship in sufficient detail to allow you to fully “translate” the agreement so that the document expresses their understanding – or at least what they *thought* was their understanding.

Moreover, the parties often have not anticipated all of the issues that should be addressed, particularly some of the finer details that so frequently lead to disputes later on. Faced with these gaps, you may be forced to make assumptions about these details – greatly increasing the risk of a future professional liability claim if one of the parties suffers damages over some circumstance the document fails to anticipate.

Scrivener requests often come from long-standing clients who are used to relying on you for advice. Although they may now express a distinct lack of interest in your active participation and communication in the transaction at hand, when things blow up later, they might nevertheless complain about your “failure” to give them advice about the downside risks to the transaction or its legal implications. They likely will refer to the parameters of your long-standing relationship, and claim that they reasonably expected that you would look out for their interests in the scrivener representation to the same extent as you had done in the past.

Lawyers acting in the scrivener role are particularly susceptible to claims from third parties alleging that the lawyer somehow had accepted responsibility for their

interests and then failed to protect those interests adequately. Any time a single attorney is asked to represent the interests of a group of people, there is a greater risk that the lawyer later will face allegations of breach of fiduciary duty or some other conflicts problem. Even if the lawyer intends to represent only one party to the transaction, duties can arise by implication and breach of those duties can lead to professional liability claims.

Lawyers acting as scriveners may like to think of themselves as having no particular obligation to achieve anything but accurate transcription of the stated agreement and having no responsibility to any individual's interest. But, the fact is that all lawyers, in all representations, must and do act on behalf of identifiable masters. All lawyers are bound by and must consider their fiduciary obligations and duties of loyalty whenever they provide professional services, in any setting. And scrivener lawyers can and do regularly face allegations that they inappropriately favored the interests of one party over the other in the transaction, or that they failed to warn one party that the transaction as structured and recorded could work against that party's best interests.

Case study in scrivener risk

The following actual case offers an example of a typical scrivener lawyer professional liability claim.

A dispute regarding ownership of a particular parcel of land developed between a landowner and a developer, who decided to work it out on their own. Eventually, the developer notified his long-time attorney that the dispute had been resolved, described the terms of the agreement, and requested that the attorney draft a document reflecting those terms. The attorney did the work requested. Both parties signed the agreement, the landowner retained possession of the property, and the matter was considered resolved.

Some months later, the landowner decided to develop the property himself. The developer objected, claiming that under their agreement he had the right to purchase the property before it was developed. A court concluded that while the agreement provided the developer a right of first refusal had the landowner decided to *sell* the property, the developer had no right to prevent the landowner from developing the property himself.

The developer then sued his attorney, claiming malpractice when drafting the agreement. The developer alleged that the attorney had an obligation to make sure the developer understood the terms of the agreement – and had the lawyer done so, the developer would have understood he was not getting an option to purchase the land as he had desired.

Defense of the claim came down to a contest between the developer’s relative experience and sophistication, the lawyer’s argument that he merely followed instructions and recorded terms *the client* had described, and expert testimony that the lawyer fell below the standard of care by failing to raise the substantive issues with the client. In light of the dynamics of prior representations between lawyer and developer and the state of the law regarding lawyers’ fiduciary obligations to clients, the case ultimately was settled for a substantial amount in favor of the developer.

How to manage the risks

The best way to avoid risks raised by agreeing to act purely as a scrivener to a transaction is to refuse such requests. If a client comes to you asking you to merely transcribe a completed transaction, advise the client strongly against doing so. One way to convincingly convey this message is to note that you and your firm take pride in your work, are very careful in how you handle each representation and would never do less than provide your clients with effective legal services – and that those standards are simply inconsistent with “assuming” that a substantially completed transaction is in the client’s best interest.

At the least, suggest that all parties be represented by counsel, even if only for the purpose of reviewing the document you draft. If you or your client find even that to be impracticable, or for some other reason you still wish to take on the assignment, there are steps you can take to help mitigate the risk.

For example, use an engagement letter to establish clearly the parameters of the representation. Include in the letter both a description of what you have been asked to do and what you will *not* be doing. This latter point may be most important. Most often, scrivener lawyers are faced with accusations that they failed to address a certain issue or failed to thoroughly consider a particular party’s interests. An engagement letter that

specifies that you will not be addressing certain issues in the engagement can be extremely helpful in establishing a defense against scrivener malpractice claims.

Along these same lines, an engagement agreement that specifies clearly who is and is not the client can go a long way toward controlling potential professional liability losses in these situations. Proactively communicate with all parties to the transaction. Do all that can reasonably be done to precisely and clearly delineate the relationship. Too much is better than too little. This is especially important when you will be representing only one individual and the other participants do not intend to retain separate counsel. The focus should be on helping the parties clearly understand the relationship so that they cannot later claim that their reasonable understanding of the situation was that you would protect the interests of participants you had no intention of representing.

Sometimes, lawyers seek to address these risks with “anticipatory” waivers of conflicts. While no conflict exists at the beginning of the relationship, they ask the parties to sign agreements that would allow the attorney to continue to represent one party against the interests of another should conflicts arise later on. These waivers rarely are effective in the harsh light of day. All a complaining party need say is that, at the time they agreed to the waiver, they did not anticipate the particular circumstance now at hand. The waiver was therefore not sufficiently “informed,” the argument continues, and will not serve to avoid application of the ethics rules to the situation.

Finally, take care to be thorough. Documents “transcribed” by a scrivener lawyer after the parties already have completed negotiation often face very little review or further negotiation. Time frequently is a factor, and by definition, the participants in the

deal are uninterested in a lot of attorney intervention. Do not be rushed or pressured into poor work by the situation. Review carefully and completely all documents you draft, and voice concerns to your client or clients you feel are appropriate and important. Treat the representation respectfully, despite any apparent casualness the circumstances may suggest.

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