How to Avoid Liability for Your Clients' Representations

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It is normal for clients to make representations in contracts, in agreements and in discovery in litigation. These representations can find their way into settlement agreements, agreements for the purchase and sale of residential and commercial properties, answers to interrogatories, and guaranties. The representations might occur in numerous ways, including those in binding agreements. However, the act of drafting an agreement for a client does not make the attorney responsible for the accuracy of the statements placed on paper. The attorney puts into writing the representations that the parties to the agreement intend to make to each other. This article will examine these situations and explain why attorneys do not have liability for their clients' representations in contracts, agreements and throughout litigation.

With every aspect of litigation, attorneys represent clients who may have different degrees of business and legal acumen. Some clients have never faced litigation before, and completely defer to the advice of counsel regarding strategy, while other clients, especially in complex commercial litigation or professional malpractice cases, have significant experience in the field. In either situation, clients make certain representations, to both their attorney and their adversary that will support their position in a case or in a contract. These representations might include the credit worthiness of the client in connection with the sale of a property, representations made in the process of settling a case, or representations made in prenuptial agreements. However, attorneys, when drafting documents, are not necessarily liable for representations made by the client. As Judge Chesler noted in *Wiebel v. Morris, Downing & Sherred*, 2009 U.S. Dist. 46088 LEXIS (D.N.J. June 2, 2009), aff 'd, (3rd Cir. June 10, 2010):

> [T]o find otherwise would create an entirely new category of liability for the legal profession: it would impose on an attorney a duty of care with regard to all content in the agreements they draft, and attorneys would effectively become guarantors of every representation when they memorialize agreements.

In *Wiebel*, Flaherty became engaged to Paul Wiebel in 1998. At the time, Flaherty lived in New York City, and Wiebel lived in Bernardsville, New Jersey. Wiebel suggested that they purchase a multi-tenant property in New York City that could serve as Flaherty's residence and provide rental income. Flaherty thereafter rented an apartment, which she made her residence. Wiebel created 50 West 86th

Street, LLC (the “Entity”) to purchase the property.

An attorney, who was a long-time friend and business associate of Wiebel, at Wiebel’s request, drafted a will, power of attorney and health care directive for Flaherty. He forwarded drafts of these documents to Flaherty on Feb. 22, 1999. In addition, in October 1999, the attorney performed preliminary work regarding a personal injury that Flaherty had sustained, but Flaherty decided not to pursue the matter.

Flaherty and Wiebel were scheduled to be married on Sept. 25, 1999, but on Aug. 26, 1999, Flaherty ended their engagement. Flaherty and Wiebel then became engaged for a second time on April 21, 2001, with plans to be married on Sept. 1, 2001. In August 2001, Wiebel presented Flaherty with a pre-nuptial agreement, which stated that Flaherty owned 49 percent of the entity and that Wiebel owned 51 percent. It provided that once Flaherty and Wiebel were married, Wiebel would give Flaherty an additional one percent interest, such that they would each own 50 percent of the entity. However, Wiebel actually owned 99 percent of the entity, and the remaining one percent was owned by Wiebel’s son.

Wiebel told Flaherty that the attorney who drafted the document was acting on his behalf only and that she should not contact him about the agreement. Flaherty was represented by separate counsel during the negotiation of the pre-nuptial agreement.

On Aug. 28, 2001, Flaherty executed the pre-nuptial agreement, and the couple was married on Sept. 1, 2001. Almost four years later, on May 31, 2005, Wiebel filed a complaint for divorce, which was finalized on Nov. 8, 2006, at which time Wiebel and Flaherty signed a Property Settlement Agreement.

After the agreement was signed, Flaherty filed a complaint in district court against Wiebel’s attorney who had originally drafted the settlement agreement, alleging that she (Flaherty) was disadvantaged in the divorce negotiations because the prenuptial agreement misrepresented her ownership interest in the entity. In response, the attorney asserted that when an attorney drafts a document which places an agreement between parties in writing, statements contained within the written agreement do not constitute a representation or misrepresentation made by that attorney, within the meaning of *Banco Popular N. Am. v. Gandi*, 184 N.J. 161 (2005).

The district court in *Wiebel* had to decide whether plaintiff Flaherty had alleged an actionable claim for misrepresentation within the meaning of *Banco Popular*. In deciding this case, the district court deferred to Black’s Law Dictionary, where “representation” is defined as: “A presentation of fact-either by words or by conduct made to induce someone to act, esp. to enter into a contract; esp., the manifestation to another that a fact, including a state of mind, exists.” Black’s Law Dictionary (8th ed. 2004). Representing is not merely the sending of information to another, but involves acting with a purpose to influence that other person.

In *Wiebel*, plaintiff Flaherty alleged that the attorney sent out information by drafting an agreement, but not that the attorney, in doing so, acted with the purpose of

influencing the plaintiff. She alleged that the attorney "knew or should have known that plaintiff would rely on the representations of the defendant attorney." However, the district court held that the plaintiff did not allege any purposeful action. The district court noted that the plaintiff alleged only that the attorney had previously represented the plaintiff, knew her socially, and drafted an agreement to which she was a party. The District Court held that this was insufficient to raise the inference that the attorney invited the plaintiff's reliance, nor that it raised her right to relief above a speculative level.

On appeal to the Third Circuit, the court agreed with the district court that New Jersey law does not recognize a cause of action for violation of the Rules of Professional Conduct, and that the matter failed to state a claim based on the attorney's limited duties owed to nonclients, since drafting the prenuptial agreement was not a situation where a non-client would have reasonably relied on the attorney's representations.

Wiebel, and its procedural history, is important in the context of liability of the drafting attorney for representations made by his or her client. The district court's holding in *Wiebel* is also followed by other jurisdictions. For example, in New York, the drafting attorney is not necessarily liable for the fraudulent representations made by his or her client in a written agreement. See, *Gansett One v. Husch Blackwell*, 2017 N.Y. Misc. LEXIS 4517 (citing, *Jordan Inv. Co. v. Hunter Green Invs.*, 2003 U.S. Dist. LEXIS 5182 (S.D. NY Mar. 31, 2003)) (applying New York law and finding the attorney made no misrepresentation where the only allegation was that the defendant prepared the allegedly fraudulent drafts on behalf of his clients). See also, *Friedman v. Hartmann*, 1994 U.S. Dist. LEXIS 3404 (SD NY Mar. 22, 1994) (noting that "an attorney does not ordinarily sign a contract he prepares for his client since the statements and undertakings laid out in the document are made by and binding upon the client rather than the attorney."). Additionally, in Pennsylvania, an attorney is entitled to rely in good faith upon the statement of facts made to him or her by the client and is not under a duty to institute an inquiry for the purpose of verifying the statement before giving advice thereon. See, *Meiksin v. Howard Hanna Co.*, 404 Pa. Super. 417 (Pa.Super. Ct. 1991) (finding that if the client falsifies the facts, there may be a liability which attaches to the client, but not the lawyer if he acts in good faith upon the facts stated by the client); see also. *Kit v. Mitchell*, 2001 PA Super. 94 (Pa. Super. Ct. 2001).

Practitioners must remember that the attorney puts into writing only the representations that the parties to the agreement intend to make to each other. An attorney who puts into writing an agreement between two parties does not vouch for the representations either party has made to the other. The act of drafting does not make the attorney responsible for the accuracy of the statements placed on paper. To find otherwise would create an entirely new category of liability for the legal profession: It would impose on attorneys a duty of care with regard to all content in the agreements they draft, and attorneys would effectively become guarantors of every representation when they memorialize agreements. The scope of attorney liability to third parties for drafting documents is limited, and courts, both state

and federal, have not permitted such a broad expansion of the rules of professional liability to the attorney who simply drafts documents in which the clients have made representations to each other.

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