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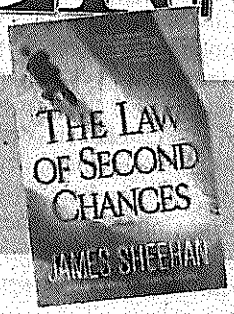
Write it and they will come
Hundreds attend a book-signing party for a Quincy attorney whose first novel was recently released — page 5



Murder and mayhem
James Sheehan's "The Law of Second Chances," a "page-turner" courtroom drama, is the subject of a Fine Print book review — page 19

No such thing as a free lunch
Offering easy access to a number of Boston courthouses and law firms, Houston's serves up a good meal, albeit a pricey one — page 29

E-mail exchange on counsel fees binding

Settlement agreement enforceable, says court

By Eric T. Berkman

An exchange of e-mails between opposing counsel constituted a binding agreement that the prevailing party would be entitled to attorneys' fees, even though the lawyer for the non-prevailing party stated in one of the e-mails that the terms needed to be reduced to a formal settlement document, the Appeals Court has decided.

Attorneys say the ruling — paired with an Appeals Court decision in January holding that an e-mail exchange conducted after the third day of a civil trial constituted a binding agreement to settle the case — underscores the importance of treating negotiations via e-mail with the same formality as those conducted in a more traditional manner.


SMITH
Writes decision for Appeals Court

See opinion digest for *Fecteau Benefits Group, Inc. v. Knox, et al.* on page 18.

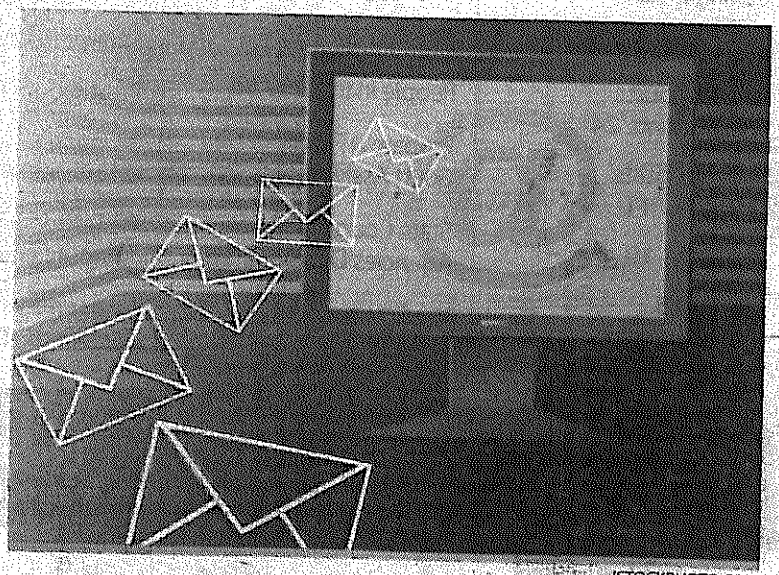
A Superior Court judge had found that the parties in this case clearly intended to be bound by the terms set forth in the e-mail exchange and that language calling for the terms to be reduced to a formal writing was simply an attempt to "memorialize" the terms and not a pre-condition to the agreement.

The Appeals Court affirmed, ruling that the trial judge's finding was not clearly erroneous.

"[The defendant's trial] attorney [whose client was the non-prevailing party] made a 'bottom line' offer to [the plaintiff] by e-mail," wrote Judge Kent B. Smith for the court.

"[The plaintiff's] attorney responded with a counteroffer, and counsel for [the defendant] replied, unambiguously indicating his agreement on the four contested issues," Smith continued. "Therefore, as a matter of law, the e-mails were sufficiently complete and definite to constitute a binding agreement."

The 14-page decision is *Fecteau Benefits Group, Inc. v. Knox, et al.*, Lawyers Weekly No. 11-114-08. The full text of *Fecteau* and the earlier Appeals Court ruling, *Basic Technology Corp. v. Amazon.com, Inc.* (Lawyers Weekly No. 11-002-08), can be found at www.masslawyersweekly.com.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Erroneous application?

Plaintiff's counsel Leonard E. Clarkin of Clarkin, Sawyer & Phillips in Wellesley called the decision "totally appropriate."

"Once an agreement is reached on all issues, that's an agreement and you can't walk away from it," he said. "You can't stand on some kind of technicality that it wasn't reduced to a writing."

Clarkin added that both *Fecteau* and *Basic Technology Corp.* send a message that "courts will be taking a look at what's expressed in writing, whether in letters or e-mails or what have you."

If all the essential terms of a contract are present, he continued, "they're going to enforce it, especially in a situation like in *Basic Technology*, where you're in mid-trial, or here where you're 24 hours before a settlement deadline to be followed by an evidentiary hearing."

Meanwhile, Andrew C. Griesinger of Griesinger, Tighe & Maffei in Boston, who represented the defendant on appeal, questioned whether

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E-mail exchange on counsel fees is binding

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it was appropriate for the Appeals Court to apply the "clearly erroneous" standard to findings of fact that were based on the trial court's review of e-mails when no evidentiary hearing was ever conducted as to the existence of an attorney-fee agreement.

"It seems that the 'clearly erroneous' standard should only apply when a complete opportunity to present evidence has been provided in the court below," said Griesinger, whose client is contemplating further appeal.

Daniel P. Dain, a commercial and real-estate litigator with Brennan, Dain, LeRay & Wiest in Boston, said the *Fecteau* ruling gives lawyers a heads-up that contract negotiations via e-mail are treated no differently than any other negotiation technique and can create binding contracts whenever evidence suggests that was the intent from the face of the e-mail.

"There's no doubt that lawyers who write letters are more apt to put in additional language, such as [a clause] stating that any offer or acceptance is expressly conditioned on a subsequent detailed and more formalized writing," said Dain. "Lawyers need to be sure to do that with e-mails as well, if that's what they intend."

CASE: *Fecteau Benefits Group, Inc. v. Knox, et al.*, Lawyers Weekly No. 11-114-08

COURT: Appeals Court

ISSUE: Did an exchange of e-mails between opposing attorneys in a contract dispute constitute a binding agreement that the prevailing party would be entitled to $175,000 in fees, even though counsel for the non-prevailing party stated in one of the e-mails that the terms needed to be reduced to a formal settlement document?

DECISION: Yes, because the trial judge's finding that the parties intended to be bound by the terms laid out in the e-mail exchange was not "clearly erroneous"

Alleged agreement

On Jan. 14, 2001, plaintiff Fecteau Benefits Group, Inc., executed an agreement to buy the pension administration business of defendant Peter L. Knox and his company, Peter L. Knox and Associates, for $250,000. The plaintiff paid $140,000 at the closing and signed a promissory note for the $110,000 balance.

Under the contract, the plaintiff was purchasing 228 client files, which were to be delivered on Jan. 19, 2001. But the contract also provided that certain files classified as "work in progress (WIP)" as of that date would not be transferred.

When a controversy erupted over the WIP files, the plaintiff declared that it would not repay the promissory note until the WIP files were transferred, while the defendant claimed that this amounted to a repudiation of the contract and that the contract's non-compete clause would lapse on July 1, 2001, if the note was not repaid in full.

Pursuant to the contract, the plaintiff brought the dispute to arbitration. The defendant then requested that the parties waive arbitration and litigate the case in Superior Court.

In November 2004, the plaintiff's contractual claims proceeded to a jury trial. The jury found for the plaintiff and awarded $75,000 in damages.

A series of e-mails between counsel for the two sides ensued, with the defendant's attorney making a "bottom line" offer to the plaintiff agreeing to pay $150,000 for counsel fees incurred through trial and $25,000 in fees for any appeal, with all fees being waived in the event of a successful appeal.

Plaintiff's counsel counteroffered via e-mail. The defendant's attorney e-mailed back, essentially agreeing to the terms in the counteroffer, but stating that the agreement needed to be reduced to a written settlement agreement and that he would report to the judge that they had an agreement "subject only to a formal document next week."

Based on the e-mails, the plaintiff filed a motion to enforce the fee agreement. The defendant opposed the motion, stating that the e-mails clearly indicated that the parties did not intend to be bound until a formal settlement document was signed between the parties.

Judge Judith Fabricant allowed the motion, finding that the e-mail exchange did, in fact, constitute a definitive agreement on the legal fees issue in the amount of $175,000.

The defendant appealed.

Not clearly erroneous

In reviewing the trial judge's factual finding of defense counsel's intent to be bound by the e-mail terms, the Appeals Court utilized the "clearly erroneous" standard of Rule 52(a) in the Massachusetts Rules of Civil Procedure.

The court first observed that defense counsel made a "bottom line" settlement offer of $175,000 in counsel fees for the litigation through appeal, that the plaintiff's lawyer counteroffered and that defense counsel's e-mailed response unambiguously indicated his agreement on the contested issues.

"The material terms were set and agreed upon," said Smith, commenting that any subsequent formal settlement document would merely be serving to "memorialize" or record the settlement terms, not to create them. "Therefore, as a matter of law, the e-mails were sufficiently complete and definite to constitute a binding agreement."

Smith noted that Fabricant found that the e-mail exchange included all material terms, a deadline for acceptance and acceptance without equivocation.

Additionally, said Smith, the trial judge relied on her familiarity with the parties and their past dealings to find that the language regarding the reduction of the agreement to a writing was simply a formality.

"Based on the e-mail exchange, we cannot say that the judge's finding of the parties' intent to be bound was clearly erroneous," Smith wrote. "Therefore, the judge properly determined that the ... e-mails constituted an agreement by which the parties intended to be bound." MLW

Eric T. Berkman, formerly a reporter for Massachusetts Lawyers Weekly, is a freelance writer.