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It's Not Goodbye, Just Until We Meet Again: Declining Representation with Prospective Clients

Each year malpractice claims are made against lawyers by individuals that the lawyers never even considered to be their clients. Why? The lawyer did not send a declination letter following the initial meeting, and never expressly communicated to the potential client, in writing, that he/she did not accept the representation and that no attorney-client relationship existed. Instead, the potential client assumed, mistakenly, that the lawyer would take action and relied on that belief resulting in deleterious conclusions. So what can a lawyer do to politely, yet firmly, place the potential client on notice that no attorney-client relationship has been established, yet at the same time not discourage future opportunities for representation?

Formation of the Attorney-Client Relationship and Prospective Clients

Lawyers converse with people all the time who are considering their options and choosing among potential counsel. Not all of them will become clients. However, as potential clients, they do reveal some specifics about their situations, and the lawyer, in return, probably shares some initial impressions of the case. While the lawyer may not believe he/she "rendered legal advice," or provided counsel, the individuals with whom the lawyer spoke may feel differently. In fact, they may leave the office believing that the lawyer is actually representing them. Or, take the example of the prospective client who, after an initial discussion, states that he/she will retain your services but who never actually signs the retainer agreement or sends any funds. How does a lawyer handle the prospective client who believes the lawyer has assumed the representation and repeatedly calls for ongoing discussions about the case but never signs on the dotted line?

The *Restatement (Third) of the Law Governing Lawyers §14*, defines the formation of the attorney-client relationship as follows: "[a] relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."[1] Further, courts will typically recognize an attorney-client relationship when the attorney's conduct would lead a reasonable person to believe that he was being represented by the attorney.[2] In these situations, courts routinely look to, and the evidence turns on, the conduct and communications of the attorney and potential client.

In addition to the formation of the relationship, attorneys also should to be mindful of *Model Rule 1.18* of the ABA Model Rules of Professional Conduct regarding duties to prospective clients. *Model Rule 1.18* defines a prospective client as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."[3] However, a person does not become a prospective client just by seeking a lawyer's services. *See*, Comment 2 to Rule 1.18. For example, if a person leaves a voice mail message or sends an unsolicited email to a lawyer containing confidential information, the individual probably has not become a prospective client. However, such situations are fraught with risk as well as the potential for misunderstanding, and lawyers can affirmatively take steps to minimize the confusion.[4]

1 Restatement (Third) of the Law Governing Lawyers §14 (2000).
2 *Parker v. Carnahan*, 772 S.W.2d 151 (Tex.App. 1989)
3 ABA Model Rule 1.18(a)(2019).
4 ABA Model Rule 1.18 also discusses duties of confidentiality as well as conflicts of interest issues that come into play with regard to prospective clients, an analysis of which is not covered in this article.

Malpractice and Prospective Clients

Comment 9 to Rule 1.18 discusses the duty of competence that a lawyer owes to a prospective client. In addition, it is well established that a lawyer may be liable to a prospective client for malpractice if the lawyer fails to comply with the standard of care expected of lawyers in declining representation. This standard of care requires that when declining representation, a lawyer must not (1) lead the prospective client to believe that the lawyer is analyzing or investigating the matter when the lawyer is not doing so; (2) give advice about the merits of the client's case without having a reasonable basis for such advice; and, (3) fail to inform the prospective client of the need to seek any second opinion promptly because of the possibilities of a claim due to the expiration of an applicable statute of limitations.

Malpractice claims brought by potential clients typically arise in a couple of ways. The first circumstance involves a lawyer who declines to represent a person in a matter, and it is not clear to the prospective client that the lawyer is declining to represent him. This misunderstanding may also occur with current clients when new legal matters are presented. The leading case on malpractice liability to prospective clients is *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. 1980). In the *Togstad* case, Mr. Togstad was left paralyzed following a medical procedure. Fourteen months later, his wife consulted with Attorney Miller of the law firm of Vesely, Otto, Miller & Keefe regarding a possible medical malpractice action. Following their first consultation, Attorney Miller told Mrs. Togstad that he did not believe she had a case, but that he would speak to his partner to confirm. Neither Attorney Miller, nor any one from the law firm, ever called back or sent a declination letter to the prospective client. After Minnesota's two-year statute of limitations on medical malpractice had expired, Mrs. Togstad brought a legal malpractice action against the firm for providing incorrect advice and failing to advise them of the two-year statute. At trial, a jury found the law firm guilty of malpractice and awarded more than $600,000 in damages.[5]

A similar result may occur in a transactional situation. A prospective or existing client might seek out a lawyer to review a residential real estate contract that is subject to review by the parties' attorneys within a certain number of days after acceptance. If the client delivers or faxes the contract to the lawyer without a clear understanding as to whether the lawyer is accepting the representation, the client may reasonably believe the lawyer is protecting his interests, and the lawyer may be liable for failing to do so.

A declination letter prevents any misunderstanding about the absence of an attorney-client relationship, and may include the following language:

> We have received [your communication] [the documents you delivered] regarding [subject matter]. While we appreciate the confidence you have expressed in our firm, we are unable to represent you in this matter for various reasons. Therefore, we are returning under cover of this letter the materials you provided for our review. We look forward to the opportunity to speak with you in the future when a legal need arises.

When declining to accept a legal matter, lawyers should be cautious in what they communicate to the client. Even if there is no question that the lawyer is not taking the case, the lawyer may become liable to the prospective client for any legal advice or opinion rendered to the prospective client. In one case, *Miller v. Metzinger*, 154 Cal.Rptr. 22 (Cal.App. 1979), the plaintiff's wrongful death case was dismissed for having been filed after the statute of limitations had run. The plaintiff had consulted four law firms. The Metzinger firm was the third. Metzinger ultimately declined to take the case, but a fact issue as to whether he informed the prospective client of his declination and that the statute of limitations was about to expire caused the appellate court to reverse summary judgment in favor of the lawyer. The court stated that even if the lawyer had withdrawn a few days before the statute expired, it would be a breach of duty to fail to inform the client of the statute of limitations issue and of the need to protect the case by filing within the prescribed time.

Because courts have found a duty to inform the client of the requirement of filing within the statutory period, a declination letter should address that issue. However, the letter should not render an opinion about when the time within which to file will expire. The declination also should include a disclaimer of any legal advice. For example, the letter may state

> In declining to take your case, we are not expressing an opinion about the merits of your position. We encourage you to consult with another attorney regarding your case if you so choose. Our decision not to accept this representation should not be interpreted as an adverse opinion about the merits of your case.

5 See also *Rice v. Forestier*, 415 S.W.2d 711 (Tex.App. 1967) for an example of a situation involving a current client, but a new, prospective matter where failure to send a declination letter resulted in prejudice to the client's legal rights.

A second scenario in which these types of claims arise is when a lawyer is involved in a transaction involving multiple parties and it is unclear to all involved which parties the lawyer will represent. In *Kotzur v. Kelly*, 791 S.W.2d 254 (Tex. App. 1990), the court found that an attorney for a seller of real estate may be liable to the buyers when the circumstances led the buyers to believe that the attorney is representing them and the lawyer has not made it clear that he was not their attorney. In this case, the client was selling 225 acres of land to his two sons. The sons did not retain another attorney, but believed that their father's attorney also represented them. When they later learned of a lien on the property, they sued the lawyer for malpractice. The sons testified that they believed the lawyer also represented them. The attorney, apparently unsure about whether he represented the sons, testified, "I didn't feel I was dealing with two different parties here" and admitted that he prepared the documents related to the transaction on a "family-type basis." The court reversed the summary judgment that had been entered in favor of the lawyer and remanded the case for trial.

In a transactional situation, especially when transactions are related to the prospective client or partners of the prospective client, it is crucial to have a writing clarifying who the lawyer represents and who the lawyer does not represent. A letter to the unrepresented parties may include language similar to the following:

> I enjoyed [meeting you] [talking with you] yesterday regarding [legal matter]. As I mentioned, I am only representing [client] in this matter. I am not representing you and cannot advise you regarding your interests in this matter. You should, therefore, consider consulting with a lawyer of your choice to represent your interests.

Guidelines for Prospective Client Declination Letters

Declination letters will be your best evidence that you have declined the representation should a dispute arise. CNA has published *Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship* to assist attorneys in this effort. *Lawyers' Toolkit 4.0* contains sample declination letters that attorneys can use as templates in drafting their own declination letters. In addition, consider these basic guidelines when drafting a declination letter to a prospective client:

- Don't delay. The decision on whether to accept or reject the representation should be made promptly and the declination letter sent as soon as possible thereafter. The less time you are connected to the prospective client, the less time there is for misunderstandings to develop, and the more time there is for the prospective client to seek legal advice from someone else, potentially mitigating any problems for which they might seek to hold you responsible. If the decision to decline a representation is made during the meeting with prospective clients, provide them with the letter before they leave your office and follow up with another copy via e-mail or U.S. mail.
- Be direct. Specifically state in the letter that you are not able to accept the case. It is not necessary to give a reason for declining the case, but you may do so if you wish. While it may seem obvious, the declination letter must clearly state that the lawyer *has not been engaged by* and *does not represent* the client in the matter.
- Less is more. Avoid commenting on the merits of the case. If you are not taking the time to research and investigate the case, you should not offer an opinion as to its worth. This is particularly true if you are not skilled in the area of law. While you are declining representation, it does not necessarily mean that the prospective client does not have a claim or that another attorney might be interested.
- If time limits apply to the case, generally advise the client that time limitations apply. Emphasize that it is imperative to consult with another lawyer immediately. The best course of action is not to advise the client of the specific date any such limitation may expire (in order to avoid a potential malpractice claim if you are wrong, particularly if you have not received sufficient information from the prospective client), but merely to advise that a limitation may exist and that you have not performed the necessary research and/or do not have the necessary information to determine the exact date.
- Return any documents that the prospective client tendered to you during the initial consultation.
- Send the declination letter by certified mail, return receipt requested, or in another manner where proof of receipt can be certain. Keep a file copy of all declination letters in a miscellaneous or non-engagement file, and be sure to enter information concerning the declined potential client in your conflict system.
- It's not goodbye, just until we meet again. While this letter is a clear and unambiguous statement that you have declined representation on this matter, it does not have to be that final goodbye and a bar to a future business relationship. The lawyer may still advise the prospective client that if circumstances change or if the prospective client has another legal matter that falls within the lawyer's areas of practice, the client may contact the lawyer again. Consider including a closing statement such as "[w]e look forward to hearing from you in the future when another legal need arises."

The absence of declination letters has contributed to the filing of legal malpractice claims by prospective clients to whom lawyers believed they owed no duty. Sending declination letters may prevent the initiation of malpractice claims or even defeat claims by prospective clients. The time it takes to write these letters may be the most important time you spend on the matter.

This article was authored for the benefit of CNA by:

Tracy L. Kepler

Tracy L. Kepler is a Risk Control Consulting Director for CNA's Lawyers' Professional Liability Program. In this role, she designs and develops content and distribution of risk control initiatives relevant to the practice of law. Tracy lectures frequently at CNA-sponsored events and at state and local bar associations and national seminars hosted by industry-leading organizations. She also writes articles focusing on law firm risk control and professional responsibility issues. Tracy previously served as the Director of the American Bar Association's Center for Professional Responsibility (CPR), providing national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism, client protection, professional liability and attorney well-being. She also served as an Associate Solicitor in the Office of General Counsel for the U.S. Patent & Trademark Office, and as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission. She is admitted to practice in Illinois, United States District Court, Northern District of Illinois, and the United States Supreme Court.

Distributed By:

McGriff | Insurance Services

1500 Riverfront Drive, Little Rock, AR 72202
Phone: 501-661-4957 Toll Free: 888-272-6656 Fax: 501-978-8486
tiffaney.davids@mcgriffinsurance.com

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