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Declination Letters: The Anti-Engagement

by David W. Holt

By now, we are all familiar with the need to clearly define the scope of representation for new engagements. Well-articulated boundaries of representation, preferably laid out in an engagement letter or other contractual document, provide clients with a clear picture of what tasks the attorney will and will not undertake on the clients' behalf. What many of us forget, however, in the frenzy of our daily routines, is the importance of also making certain that a prospective client understands when no attorney-client relationship has been formed. Oftentimes, sending declination letters to prospective clients for whom no representation is undertaken prevents future malpractice issues before they have the opportunity to arise.

Although it may seem clear to an attorney that no formal attorney-client relationship has been created, prudent practitioners ensure that prospective clients are left with the same understanding. "[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract . . . but, rather, whether the defendant's conduct was such that an attorney-client relationship could reasonably be inferred." *North Carolina State Bar v. Sheffield*, 326 S.E.2d 320, 358 (N. C. Ct. App. 1985). Indeed, the ABA Model Rules of Professional Conduct recognize that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Scope ¶ 17. If left to chance, attorney-client relationships, and the potential for malpractice issues, may arise unintentionally.

The case of *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980), offers a prime example of how a simple declination letter may have prevented a large malpractice judgment against an attorney and his firm. In the underlying case, Mr. Togstad became paralyzed while in the hospital following a surgical procedure. Approximately 14 months after Mr. Togstad's injury, his wife met with attorney defendant Miller to determine whether she and her husband had a case for medical malpractice. After hearing the facts and discussing the case with Mrs. Togstad for close to an hour, Miller advised Mrs. Togstad that, in his opinion, they did not have a case, but that he would check with his partner and call her if he changed his mind. Miller never communicated further with Mrs. Togstad. Relying on Miller's initial opinion and subsequent silence, the Togstads failed to pursue a medical malpractice claim until after the statute of limitations had run. Although Miller testified that he merely gave Mrs. Togstad his opinion that she did not have a case his firm would like to pursue, the jury sided with the Togstads. In so doing, the jury found that Miller engaged in legal malpractice by failing to warn Mrs. Togstad of the impending statute of limitations and by telling her that he did not believe she had a claim of medical malpractice. The jury awarded the Togstads almost $650,000.

In *Glover v. Lockard, Bingham & Kaplan*, 1999 WL 596384 (Tenn. Ct. App. 1999), the defendant lawyer was able to prevail against the plaintiff prospective client's malpractice claim by relying on his declination letter. The plaintiff's claim was based on the defendant's failure to file a complaint on the plaintiff's behalf with only six weeks left before the expiration of the statute of limitations. In his declination letter, the defendant notified the prospective client that he was not able to represent him in the matter, he was not qualified to bring the type of lawsuit that the prospective client sought, and that it was his understanding that there was an impending expiration of the applicable one-year statute of limitations. The appellate court affirmed the decision of the trial court granting summary judgment in favor of the defendant based on the defendant's declination letter.

As *Togstad* and *Glover* so vividly illustrate, prospective clients are not always left with the same understanding as the attorney following a preliminary consultation. If no representation is undertaken, attorneys should promptly send out declination letters clearly stating that the attorney does not represent the prospective client. It may also be a good idea to stress to the prospective client that any opinions offered by the attorney during the consultation were merely reactions to the facts presented and do not constitute legal advice going to the merits of the matter. Finally, the attorney may have an ethical obligation to inform the prospective client of any approaching deadlines, such as a response to a complaint or statute of limitations. However, in so doing, the attorney must be careful to ensure that an accurate deadline is given. *See, e.g.*, *Nicely v. McBrayer, McGinnis, Leslie & Kirkland*, 163 F.3d 376, 385 (6th Cir. 1998) (leaving open the possibility that the "attorney's allegedly erroneous statement about the viability of one's cause of action, made in the process of declining representation in the matter, can support a legal malpractice claim against the attorney under Kentucky law"). By following these simple guidelines, we can all better protect ourselves from future malpractice concerns.

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