



Prevent Costly Misunderstandings

Non-Engagement Letters

By David J. Frankenberger Jr.

Attorneys and their errors and omissions carriers are continually seeking ways to either reduce or eliminate legal malpractice exposure. One way to reduce this risk is by creating a form non-engagement letter and using this letter without hesitation after consulting with prospective clients.

Indeed, after consulting with a prospective new client and deciding not to take a case, an attorney must confirm with the prospective client that he or she will not take the case. Otherwise, there is a distinct possibility that a prospective new client may accuse an attorney of malpractice, and a court would decide that they had formed an attorney-client relationship, notwithstanding the attorney's intent to the contrary.

The *Restatement (Third) of the Law Governing Lawyers*, approved by the American Law Institute in early 1998, analyzes the formation of an attorney-client relationship. Section 26 of the *Restatement* outlines the conditions governing 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.

The *Restatement* contemplates that the attorney-client relationship arises either by consent of both parties, or under the doctrine of estoppel if a putative client reasonably has relied on a lawyer's advice. *See also Restatement of Law Governing Lawyers*, at §14(1) (concerning formation of the attorney-client relationship).

For example, a plaintiff asserted an "estoppel theory" as the basis for formation of an attorney-client relationship in the Minnesota Supreme Court case of *Togstad v. Vesely*, 291 N.W.2d 686 (Minn. 1980). In *Togstad*, the attorney decided not to accept the putative client's medical malpractice case following a legal consultation. The attorney did not discuss a fee arrangement or request medical authorizations, and the attorney did not charge

for the consultation. The attorney, however, failed to send the putative client a non-engagement letter. In turn, the putative client—acting in reasonable reliance upon the attorney's silence—failed to act upon the claim in timely fashion and ultimately sued the attorney for legal malpractice. *Id.* at 690.

In finding that the plaintiff offered sufficient evidence that an attorney-client relationship existed, the *Togstad* court reasoned (1) an attorney-client relationship is created when someone asks for and receives legal advice from an attorney in circumstances in which a reasonable person would rely on that advice; (2) an attorney-client relationship is created if it is reasonably foreseeable that a prospective client will rely upon an attorney's legal advice and could suffer damage if the advice is incorrect; and (3) in this case, the attorney acted as a legal advisor on the viability of the prospective client's claims, and the prospective client reasonably relied on that advice and on the attorney's silence. *Id.* at 692–93.

A non-engagement letter would likely have prevented the situation faced by the attorney in *Togstad*. Simply put, a non-engagement letter is a formal declaration that an attorney has declined to provide services to someone who approached him or her for a consultation. For a would-be client, the non-engagement letter serves as formal notice that if legal representation is needed, it will have to be sought from another lawyer. An attorney issues these letters to clarify his or her legal relationship to the people with whom he or she interacts to prevent future confusion.

Malpractice claims against attorneys by people those attorneys do not view as clients often arise when an attorney declines to represent someone in a matter but it is not clear to that prospective client that the lawyer will not represent that person. This situation could happen not only with a prospective client but with a new matter for a current client as well.

Although an attorney has an absolute right to decline representation to a current client or prospective client in a matter, the attorney also has a legal and ethical obligation to inform the client or prospective client of this decision. Sending a non-engagement letter under these circumstances should prevent misunderstanding about the absence of an attorney-client relationship, and it would serve to protect an attorney from dreaded legal malpractice claims against the attorney and his or her law firm.



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