

## LEGAL MALPRACTICE: AVOIDING LIABILITY BY DOCUMENTING THE ATTORNEY-CLIENT RELATIONSHIP

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The best way to deal with a legal malpractice suit is to prevent it before the attorney-client relationship is entered into or terminated. While it is not possible to prevent an unsatisfied client from suing, an attorney can lessen the likelihood of an adverse result by documenting the formation and termination of the attorney-client relationship. Letters of engagement, declination and disengagement can be effective in demonstrating that the defendant attorney did not violate his client's trust or failed to render the agreed upon services. The right letter can avoid a costly liability situation.

### Engagement Letters

Engagement letters can significantly reduce liability in a malpractice suit by showing that the claim being made by the client was not part of the agreed representation. Engagement letters are written agreements which identify and clarify numerous aspects of the attorney-client relationship. While it may seem burdensome, clear and descriptive engagement letters can help to avoid adverse results in legal malpractice suits. These letters should identify the client; describe the fees and expenses; include an alternative dispute resolution procedure; and identify the rights and duties of both the attorney and the client. Since these letters are extremely valuable, it is important to have either the client sign the letter or document its receipt by the client. Although this information may seem obvious at the time, something as simple as identifying the client can prevent future problems. In Kotzur v. Kelly, 791 S.W. 2d 254 (Tex. App. 1990), the client was selling land to his two sons. Both sons believed that they were also represented by their father's attorney. When they discovered a lien on the property, the sons sued the lawyer for malpractice. An engagement letter identifying the client would likely have prevented this case from going to trial.

### Limited Scope of Representation

In an engagement letter, the attorney should clearly describe the scope of the representation. This should include what the attorney will be doing in plain English and may even include, when necessary, a listing of issues not included in the scope of the representation. In Douglas v. Dashevsky, NY Slip Op 04187 (2d Dept. 2009), the Court of Appeals found that the language of the retainer agreement did not, as a matter of law, limit the defendant attorney's obligation to advising the plaintiff solely on the matter

of the plaintiff's wrongful termination suit. Conversely, in AmBase Corp. v. Davis, Polk, & Wardwell, 8 N.Y. 2d 428 (2007), the Court of Appeals found that the malpractice suit was outside the language in the retainer. The retainer agreement specified that the client corporation had hired the defendant law firm to represent it in the tax issues that were before the IRS, therefore the issue of whether the client was primarily or secondarily liable was outside the scope of the retainer. As evidenced by these two cases, specific language will likely alleviate liability in a legal malpractice suit.

### **Declination Letter**

Increasingly the person bringing a legal malpractice claim is not a client of the attorney. The attorney may have met the potential client for a consultation but one or both chose not to proceed further. In order to prevent the potential client from being able to hold the attorney liable in the future, it is important to make clear that the attorney or law firm is not establishing an attorney-client relationship. One way to do this is through a declination letter, also known as a non-engagement letter. It is important to specify in the letter that the attorney or firm will not be taking the individual on as a client. In addition, an attorney must be careful not to give legal advice within the letter, but should still inform the person that they should seek out another attorney for a second opinion and caution the individual that their case may be time sensitive. The information given should be general, and the letter should not include a referral to a particular attorney or specify a statute of limitation. In Camarillo v. Vaage, 105 Cal. App. 4<sup>th</sup> 552 (2003), the Appellate Court found that the law firm's comments about the merits of the case did not establish an attorney-client relationship because the firm had already sent a declination letter and the comments simply explained why it had chosen not to take the case. In addition, the letter had advised the plaintiff to seek advice from another attorney. However, where comments become advice it is a thin line, and it is best for an attorney not to discuss the merits of a case with an individual that has been declined.

It is also important to send out the declination letter as soon as possible. In Wadlington v. Rolshouse, Slip Copy, 2008 WL 1712293, the attorney did not inform the client for 7 months after the client signed the retainer agreement that the attorney would not be accepting the case. As a result, the court found that it was reasonable for the plaintiff to believe the attorney would be representing her and an attorney-client relationship existed. In addition to sending out declination letters quickly, firms should verify in some way that the individual has received the letter to prevent issues should the individual bring a legal malpractice suit.

### **Disengagement Letter**

Not infrequently it is necessary to sever ties with a client after the client-attorney relationship has been established. This may be for any reason including the resolution of a case or the request of either the client or attorney. However, no matter the reason, it is extremely important to document the termination of the relationship so that the

attorney can identify whether the issues being brought in the legal malpractice suit were the result of actions that occurred during the client-attorney relationship. The attorney should verify that the client received the letter, which should clearly state that the firm is no longer representing the client in an action. The letter should also include the date of the severance of the relationship as well as the reason for disengagement. If the relationship is terminated during a case the letter should also make note of any statute of limitations issues and recommend that the client seek other counsel. In situations where the lawyer has worked with the client on more than one issue, the letter should clearly indicate whether the attorney-client relationship has ended or whether the termination is particular to one matter and the relationship continues to exist. However, as with the declination letters, the disengagement letter should not discuss the merits of the case.

### **Conclusion**

Proper documentation of the formation and termination of the attorney-client relationship can avoid costly adverse results and potentially avoid a lawyer from being named a defendant in a legal malpractice suit. In addition, these documents can prevent “lawyer angst” should a client choose to bring suit. It is important that attorneys and law firms implement procedures that will ensure that these letters are properly worded, sent and their receipt documented. The benefits afforded by these preventative documents are well worth an attorney’s time and effort.

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34808/002  
Last revised 2/3/10