Non-Engagement, Limited Engagement Letters Reduce Malpractice Risk

By Edward J. Rolwes

It is probably no surprise that most legal malpractice suits are based on attorney omissions rather than active conduct. Obviously, an attorney who agrees to pursue a suit must be mindful of the statute of limitations and other deadlines. What is often overlooked is the considerable risk of being sued by a non-client for missing a deadline following a non-engagement or by an actual client for not pursuing a claim that you never agreed to undertake. While these risk can never be eliminated, they can be reduced through consistent use of non-engagement and limited engagement letters.

Non-engagements always include the risk that the non-client will claim you were hired to pursue a matter that the you never agreed to undertake. Many legal malpractice cases are based on this charge. Frequently, the claim is that the attorney was retained to file a suit and failed to do so and the defense is the suit was never filed but the lawyer was never hired.

In too many cases, there is little documentary evidence to resolve this dispute. If a would-be-plaintiff simply testifies she understood that you agreed to represent her and file her case, you should be able to obtain summary judgment based on the absence of agency, provided no other facts show an actual agency relationship. However, the lack of a document confirming the absence of the attorney/client relationship increases the chances that you may be sued. You may win the case but you will have to undergo the stress, anxiety and expense of the suit itself to do so. Having a contemporaneous document in your file will go a long way to preventing you from ever being sued in the first place.

In order to decline a case you must first be aware that the potential client asked your firm to handle the matter. Care must be taken to determine the limits of staff member discussions with potential clients and insure there is adequate follow-up, if necessary, on any such discussions.

Attorneys usually decline a case either in person or by telephone. Since the potential client then becomes aware of your decision not to take the case, there is a tendency to move on to client matters (that actually pay bills) and set the non-retained matter aside. Although often inconvenient, if you decline a case, it is critical that you document the declination in some manner, usually through correspondence to the person being turned down. This safeguard is too often put off due to the time constraints of practice. Having a form letter in your office that can be adapted to the specific case helps accomplish this task in a timely manner.

Many attorneys have learned the hard way that it is much less inconvenient to send a letter declining retention than to defend the legal malpractice claim. If you don't you are increasing the odds that the non-client will later conclude, either through an honest misunderstanding or otherwise, that you were in fact hired to pursue the claim and failed to do so.

Non-client/missed deadline suits can also arise when the attorney has been hired by one or more but less than all potential plaintiffs or defendants. Your involvement in the suit on behalf of some of the parties may indicate, absent other evidence, that you also agreed to handle the claim for the non-client. This risk increases if you have also met with the non-client and decided, for whatever reason, not to also take his case. Again, a letter confirming who is and who isn't your client will help prevent the claim by the non-client that you failed to also pursue or defend his interest. This sounds like nothing more than common sense, but actual attorney malpractice filings suggests that the carefully drafted non-retention letter is too often the exception rather than the rule.

Absent documentation, the limited engagement situation also presents an increased risk for a missed deadline claim. It is not unusual to decide to pursue one or more but not all potential claims for a client. If the client agrees you have entered into a "limited engagement." Since an attorney's duty to the client is limited to the scope of the retention, it is important to document the limits of the engagement to show the boundaries of your assumed duties. A limited engagement letter will help clarify for the client what it is you will and will not be doing and help avoid any honest misunderstandings. Frequently, this issue arises in workers' compensation cases where a personal injury suit is also a possibility.

The wording of the retention agreement is also important, especially when any preprinted forms are used. Many standard forms provide that the attorney has been retained to file all potential causes of action arising out of an incident. This language is frequently left in the signed agreement even when the scope of retention is more limited. If a form is used, the lawyer must take the time to tailor the document to the individual case. The preprinted form also should prompt the attorney to list any clams that are not part of the retention.

Many legal malpractice suits will continue to arise from alleged omissions rather than active conduct, including missed deadlines. While taking the time to document a non-engagement or a limited engagement can never eliminate the risk of a missed deadline suit by a non-client or a claim by an existing client for a non-retained matter, it can make the chances of such a claim very unlikely.

About The Author

Edward J. Rolwes is a partner with the law firm of Rolwes & Platt, a firm with offices in St. Louis and Chicago. Rolwes & Platt represents lawyers and other professionals in malpractice and disciplinary matters. Mr. Rolwes may be contacted at 314-469-7800 or by e-mail at erolwes@rplawyers.com.