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■ Bulletin # 190

Does a 7-Minute Call Create a Solicitor / Client Relationship?

The fact scenario is a familiar one. A busy lawyer returns a call from a potential client who is considering changing lawyers. He speaks with her for a few minutes and then books an appointment to meet with her. The appointment is cancelled and the lawyer thinks nothing more of it. Some months later, the lawyer is retained to act in proceedings against the prospective client. The prospective client seeks to have the lawyer removed on the basis of a conflict of interest.

In *Tauber v Tauber*, 2009 CanLII 72088 (ON S.C.) the court dealt with essentially these facts. While driving in his car, the lawyer returned a call to Ms Tauber, who was also travelling when she answered the call. Cell phone records verified that the conversation lasted 7 minutes. At the time, Ms Tauber was represented by counsel in marital proceedings and was thinking about changing lawyers. During the call, an appointment was booked to meet the following weekend. The next day, Ms Tauber cancelled the appointment, having decided that she would not change counsel. The lawyer did not record any notes of the conversation; he did not send an account for the call; he did not open a file; and his recollection of the conversation was limited.

The issue in this case was whether the phone conversation with Ms Tauber placed the lawyer in a conflict of interest when he was retained by Mr. Tauber some five months later. In addressing the issue, the court referred to the decision in *MacDonald Estate v. Martin*, 1990 CanLII 32 (S.C.C.) and applied the two-part test set out there: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? and (2) Is there a risk that it will be used to the prejudice of the client? The court found that the first test was not met because there never was a solicitor-client relationship and the lawyer did not receive any confidential information from Ms Tauber. The second question, therefore, was irrelevant and not addressed by the court.

In this case, the court accepted the evidence of the lawyer stating that he did not receive any confidential information during the course of his phone call to Ms Tauber. But it isn't difficult to imagine a scenario where that evidence, based on a busy lawyer's limited recall of a phone conversation that took place months earlier, might not be sufficient to convince a court that confidential information had not been received.

Proving the contents of this lawyer's communication with a potential client months after the event might have been more easily accomplished if there were some other evidence to corroborate his recollection. Notes of the conversation could have been made immediately after the call by placing a call to his assistant or his personal voice mail and dictating a brief memo. Alternatively, a memo outlining the contents of the call could have been made on arrival at his destination. Upon return to his office, this contact could have been entered into the firm's conflicts checking system.

Making note of even the briefest contacts with potential clients is always good practice and should be part of your conflict of interest policies. The Canadian Bar Association's Conflicts of Interest Toolkit (www.cba.org/CBA/groups/conflicts/toolkit2.aspx) contains the useful *Checklist for Avoiding Phantom Clients*. If these best practices are not already part of your office protocols, consider incorporating this checklist into your practice.

■ Bulletin # 191

Think Twice About Bank Drafts

A law firm sent a local courier company to a financial institution to pick up a substantial bank draft payable to the law firm for mortgage proceeds on a real estate transaction. The bank draft was picked up but never delivered to the law firm. On inquiry, the courier company advised the firm that the driver who picked up the draft did not show up to work the next day. The law firm wisely called its insurer. The financial institution put a 'stop payment' on the draft and agreed to re-issue a bank draft if the law firm signed an indemnity. Fortunately, in this scenario, the courier driver was just having a bad day and appears to have misplaced the envelope rather than absconding with it.

In another case, a lawyer mailed a bank draft to the Korean beneficiary of an estate. The bank draft went missing and the financial institution refused to take an indemnification from the estate, and instead required either a bond or a co-signature from the lawyer's liability insurer

on an indemnification before they would let the estate deal with the money. The insurer co-signed the indemnity and the lawyer was then able to deal with the estate funds.

Remember that sending a bank draft is much like sending cash. Most often, if it goes astray, the financial institution will not agree to "stop payment" and will require that the lawyer sign an indemnity assuming liability if the original draft is ultimately cashed by the intended recipient. The intended recipients may also be asked to acknowledge in writing that they have not received the draft and to agree not to negotiate the draft if it is ultimately received, and to return it to the lawyer or financial institution.

While there is no actual basis for an insurance claim unless the original bank draft is fraudulently negotiated and there is a call on the indemnity given to the financial institution, you should nonetheless contact your insurer when you become aware of the potential for a claim to be made (that is, upon learning of the disappearance of the bank draft). If the draft is ultimately negotiated by someone other than the intended recipient, the lawyer responsible for the delivery of the draft will need to make a claim under the policy of professional liability insurance.

■ Bulletin # 192

Should You Have a Friends & Family Rate?

Set a Family and Friends Rate proclaimed the article. Author Randall Ryder noted the perennial problem faced by lawyers everywhere - friends and family who expect free advice or at minimum, a substantially reduced rate for the advice and services provided. In dealing with this situation, Ryder advised lawyers to:

1. Determine in advance who qualifies for a discounted rate, if anyone;
2. Expect friends and family to take your services for granted; and
3. Be prepared for the worst case scenario.

Representing friends and family puts you in a precarious position. Getting paid (at your pre-established "friends and family" rate, of course) is only one issue. There are other dangers in taking on these cases that put you at risk of making mistakes.

It's easy to take short-cuts in communication with people near and dear to you. Imagine, for example, that you are instructed to take some action that you have advised against. Will you feel comfortable writing your standard confirmation-of-acting-against-advice letter to your neighbour or will you tone it down a bit, or even fail to write it altogether? What about the conversation you might have about the case over dinner? Will you remember to make notes after dessert, or to dictate a memo to file confirming the information and instructions received? The informal nature of communications with friends and family members can make it more challenging to record and confirm instructions received.

Consider also the ethical minefield you could be walking through. Will you have the courage to withdraw if the close friend you are acting for gives you instructions that compromise your professional obligations? Or will you make concessions in terms of your professional ethics so as to save the relationship?

Ryder's third piece of advice is best: Be prepared for the worst case scenario. Remember that if you take too casual an approach and make an error in representing a friend or family member, it is still an error that you must report to your professional liability insurer.

Source: *Set a Family and Friends Rate* by Randall Ryder, published January 15, 2010 on Lawyerist.com, http://lawyerist.com/friends-and-family-rate/

■ Bulletin # 193

How to Annoy (or Lose) a Client in 7 Easy Steps

1. Speak only in *legalese*. Make a point of using Latin terms and providing complex answers to questions from clients. Avoid plain language and clarity.
2. Keep your clients in the dark. Don't send regular updates or otherwise inform them of what you are doing on their behalf.
3. Don't focus your attention on what your clients are saying to you. Take calls, read emails on your Blackberry and check your watch during client meetings.
4. Raise your rates without explanation and charge for every second (i.e. nickel & dime them to death.)
5. Don't return calls or respond to emails within a reasonable period of time.
6. Ignore your clients' priorities and deadlines.
7. Resist implementing technological advances that would save your clients time and money.

Strict application of these “tips” will ensure that you never have too many clients. On the other hand, you may still be quite busy defending yourself against disciplinary charges or professional negligence claims.

Sources:

- *Top 10 Reasons Why Entrepreneurs Hate Lawyers,* published January 14, 2010 on Venturehacks.com
- *Six Ways to Lose a Client and How You Can Avoid Them* by Kimberly Alford Rice, published January 2010 on Law Practice Today, http://www.abanet.org/lpm/lpt/