

CASE STUDY: The Non-Engagement Letter



*The wisest men follow
their own direction.*

Euripides

The Facts

Michelle Law (“Law”) is a lawyer in Kuala Lumpur who’s main area of practice involves medical negligence. Sulaiman Wahab is Law’s client. While on vacation in Sipadan Island, Sabah, Encik Sulaiman suffered a severe reaction to medication prescribed by his family physician. The reaction required Encik Sulaiman to eventually seek treatment at a government hospital in Sabah (the hospital). Encik Sulaiman’s family physician is located Kuala Lumpur.

Encik Sulaiman took approximately a year to fully recover from his medical complications (as a result of the reaction). A few months later, on his children’s advice, he consulted Law about filing a suit against his family physician.

Law discovered that the reaction suffered by Encik Sulaiman is a common side effect of the medication prescribed by his treating physician. A consulting medical expert orally advises Law that had Encik Sulaiman sought medical treatment earlier, the residual effects of the reaction would have been minimal.

Law believes that Encik Sulaiman was not properly warned of the side effects of the medication and was not properly instructed to seek immediate medical treatment if an adverse reaction occurred. Law agrees to take the case and enters into a retainer agreement with Encik Sulaiman. The retainer agreement provides that Law will represent Encik Sulaiman against the parties who caused his medical complications.

Law filed a suit in the Kuala Lumpur

High Court against the family physician and, during discovery, learns that there may be a case against the hospital in Sabah. Law orally advises Encik Sulaiman that she is not able to pursue the case for him in Sabah, but that she can find a lawyer in Sabah to initiate a negligence suit against the hospital that provided treatment. Law believes that the stronger case lies against the family physician that prescribed the medication.

Referral

Law, through her contacts, locates a Sabah lawyer named Stan Munusamy (“Munusamy”) who maintains a general practice. Law sends Munusamy some medical records and refers Encik Sulaiman’s case against the hospital to Munusamy. Law’s cover letter mentions nothing about a fee arrangement, only that Munusamy should liaise with Encik Sulaiman to determine if a viable claim exists against the hospital.

Law calls Munusamy on several occasions to ask whether the suit against the hospital has been filed. On each occasion, Munusamy is out of the office; Law speaks to Munusamy’s assistant instead, who tells Law that Munusamy was in the midst of reviewing and preparing Encik Sulaiman’s papers. Law assumes that Munusamy has timely filed the suit and will, as requested in her earlier letter to him, liaise with Encik Sulaiman directly.

Several months later, during an office visit to discuss the KL suit, Law asks Encik Sulaiman if he ever heard back from Munusamy. Encik Sulaiman says that he has not heard from Munusamy at all – he assumed that Law would be following up on the Sabah hospital suit. Law proceeds to write to Munusamy

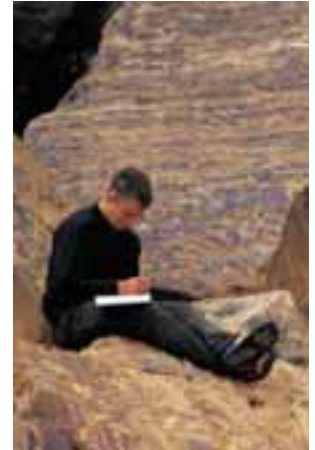
requesting an update on the Sabah suit. Munusamy writes back stating that he never agreed to take the case; he only agreed to review the file materials to determine if there was any basis for a suit. Munusamy points to the fact that no retainer agreement exists between him and Encik Sulaiman. In addition, Munusamy discloses for the first time that a potential conflict exists, such that he would be ethically prohibited from suing the hospital.

The Implications

Encik Sulaiman consults a new lawyer, who replaces Law as counsel in the KL suit and eventually files a negligence suit against both Law and Munusamy for failing to protect his interests against the statute of limitations running against the Sabah hospital.

Discovery reveals that the hospital was grossly negligent in its treatment of Encik Sulaiman and that Encik Sulaiman had sought medical assistance on a timely basis after the onset of the reaction. Had the hospital followed proper protocol, the residual effects of the reaction would have been minimal. The suit against the family physician is settled by Encik Sulaiman's new lawyer for nuisance value.

Law attempts to argue that she never agreed to handle the Sabah suit and that she made an appropriate referral to a Sabah lawyer. Munusamy alleges that no lawyer-client relationship ever existed between him and Encik Sulaiman. Eventually, the claims against both Law and Munusamy are settled out of court by their insurers for a substantial sum.



A lot of people are afraid to say what they want. That's why they don't get what they want.

[Madonna](#)

TRAPS THAT TRIP

Law could have prevented the claim against her had she utilised a non-engagement letter:

- ✗ Law, who is not an admitted member of the Sabah Bar, was legally prevented from filing a suit in that State. The fact that she cannot file a suit there is insufficient to shield her from liability for the running of the statute of limitations.
- ✗ Law's oral statement that she would not be initiating the suit against the Sabah hospital will not absolve her of liability. The broad language in the initial retainer agreement between Law and Encik Sulaiman most likely will be sufficient to establish the scope of Law's duty to Encik Sulaiman and enable the case to go to court.

! *By executing a non-engagement letter and modifying her retainer agreement, Law could have protected herself from exposure to this claim!*

Munusamy also could have used a non-engagement letter to prevent a claim against him:

- ✗ By immediately focusing on the conflict issue, Munusamy could have disclosed to both Law and Encik Sulaiman the fact that he could not bring a suit against the hospital.
- ✗ This would have allowed Law and Encik Sulaiman sufficient time to obtain another Sabah lawyer who could have timely brought the suit.

! *Both Law and Munusamy failed to inform Encik Sulaiman of the shorter limitation period under the Public Authority Protection Act 1948 (3 years instead of 6 years) in relation to his Sabah hospital negligence suit.*



*If you must play,
decide upon three
things at the start:
the rules of the game,
the stakes, and the
quitting time.*

Chinese Proverb

TOOLS FOR THOUGHT

Do make sure that in declining instructions, your law practice issues:

- ♦ **Non-engagement Letters.** Non-engagement letters may be just as, if not more important than retainer letters. Therefore, in the event you decide not to accept a client's instructions, ensure that a non-engagement letter is sent to them advising them that they should seek a new lawyer.

As per the samples provided in the accompanying article, "An Unlikely Risk: The Non-Client", non-engagement letters should be brief but contain the following:

- (i) *Statement of Declined Representation.* Any non-engagement letter should reference enough facts to identify the matter and should specifically decline representation.
- (ii) *Time Sensitive Dates.* Without calculating the exact dates involved, the non-engagement letter should alert the non-client to any pertinent statute of limitations and other imminent deadlines.
- (iii) *Recommending Other Lawyers.* Although specific referrals to other lawyers are risky, the non-engagement letter should always recommend that the non-client consult with another lawyer on the case in question.

Do make sure that in accepting instructions, your law practice verifies, issues and/ or conducts:

- ♦ **Identity of Client and Lawyer.** This may sound obvious, but it can go a long way in preventing or resolving any potential misunderstandings. In some cases, you may also need to specify whom you are not representing.
- ♦ **Engagement/ Retainer Letters.** The most important aspect of risk management in your law practice. You should ensure that your clients know what you will or will not do for them. Therefore, the fee, scope and objectives of representation should be in writing.

Specify the matter for which your law practice has been retained. Clients may be involved in more than one claim. By specifying the matter for which your law practice has been retained, you can avoid any potential claim that the client had hired you for both matters. Therefore, your retainer letter should be as comprehensive as possible and written in simple language, avoid legalese whenever possible. This will also allow clients an early opportunity to correct any discrepancies and/ or decide against engaging you as their lawyer.

It is advisable to have clients acknowledge and sign their agreement to this retainer. There should be two signed copies of this agreement – a copy for the client's reference and the second copy to be kept in the client's file.

Further, if your law practice has a standard terms and conditions form, it should be enclosed with the retainer letter.

- ♦ **Fee Agreements.** Your fee agreement should also be in writing. Any fee agreement should identify who the client is, denominate who will be paying for the representation. You must inform the client in writing what your rates will be. Further, it is prudent to tell your clients how you will be billing them – monthly, quarterly, etc. and to agree on the timing and form of their payments. Have the client acknowledge and sign this agreement.
- ♦ **Conflicts of Interest Checks.** Do a conflicts check on both your client and the other party (and the directors, subsidiaries, etc where applicable), consider the conflicts issues, consider the effect your own interests may have on the representation and the effect of any third parties' interests, and consult with your client. This is not just important at the start but throughout representation, you will need to identify and analyse whether any conflicts of interest have arisen and handle them accordingly.
- ♦ **File Closure Letters.** File closure letters should incorporate various points such as:
 - (i) *Reason(s) for the File Closure.* It could be that the work has been completed or that the client has decided to change lawyers or has given you no further instructions.
 - (ii) *Work Done.* Explain fully in your file closure letter all the work that has been done and the outcome.
 - (iii) *Outstanding Matters.* If there are any outstanding matters to be dealt with by the client, the letter should clearly state what these matters are and the deadlines, if any.
 - (iv) *The Client's File.* Find out from the client if they would like their physical file returned to them or if they would prefer that your law practice stores it. Inform clients how long you will store their file for, if they choose the latter option.
 - (v) *Return Original Documents.* Ensure that all original documents are enclosed with your file closure letter and that clients acknowledge receipt of these documents.
 - (vi) *Acknowledge Receipt.* It is a good idea to send two copies of the file closure letter to the client and ask them to sign both letters and send one back to you.
- ♦ **Disengagement Letters.** This letter should be in writing and should advise the client that the matter entrusted to your law practice has ended, giving reasons, and what, if any, additional action may be required.

Client, conflict checks and documentation of the above processes will not prevent all potential problems, but will provide an increased likelihood of getting paid, avoiding conflicts, and reducing negligence suits associated with dissatisfied clients.



*In matters of style,
swim with the current;
in matters of principle,
stand like a rock.*

Thomas Jefferson