

## AN UNLIKELY RISK: THE NON-CLIENT



*It is our choices that show what we truly are, far more than our abilities.*

**J. K. Rowling**

Advocates and solicitors (A&S) owe many duties to their clients, but generally do not owe duties to the public while performing their obligations to their clients. It is paramount, therefore, that an A&S be able to distinguish between clients and non-clients. While this may sound like a simple task, often it is not.

Suits by persons claiming to be clients (but whom the A&S did not intend to represent) frequently fall into three categories:

- (i) Plaintiffs who claim to have been clients, because they benefited from the legal services that the A&S provided to his actual client (for example, participants in a multi-party transaction, beneficiaries, etc).
- (ii) Where the A&S believes he declined to represent the plaintiff, but the plaintiff believes otherwise.
- (iii) Plaintiffs who claim to have relied on advice or a legal opinion the A&S provided to a client, that the client then disseminated to others.

The Case Study, found at the end of this article, provides an example of how such disputes may arise. Presented is a classic situation where the A&S believes she is not representing the potential client, but the potential client believes otherwise. In the example, the A&S did not realise that she and the plaintiff had different understandings until after the statute of limitations had run on the plaintiff's claims in the Sabah hospital case.

Another example of how conflict frequently arises is in a failed business venture. In such disputes, the A&S may have represented one party in the venture while other interested parties in that venture were unrepresented. When the venture fails, the unrepresented owners of the company, and sometimes its investors, may claim that the A&S was also their A&S, and failed to adequately protect their interests! Any ambiguity or absence of sufficient documentation on who the A&S did or did not represent in the failed business venture may leave the A&S vulnerable to a negligence suit.

Lawyer-client relationships are based on contract. That contract, however, can be implied from the conduct of the parties. The absence of the normal indicia of a lawyer-client relationship (such as a fee agreement and billing statements) may not be dispositive of the question of whether a lawyer-client relationship exists. Hence, the best protection against such claims is documentation of

- (a) Who the A&S represented
- (b) On what matters, and
- (c) Documentation of who the A&S *did not* represent.

The scope of an A&S's representation (of a client) should, as far as possible, be defined in a fee agreement and/or retention letter. These documents should clearly state who the A&S is representing and the scope of that representation.

Should an A&S decline to represent a potential client, he should document

that decision in a “non-engagement” letter to that potential client as well. Without such documentation, the alleged client may be able to create sufficient questions of fact to submit the question of the existence of a lawyer-client relationship to the judge.

Problems like the one highlighted in the Case Study may be avoided by taking a few minutes to prepare and provide a non-engagement letter. Following are sample non-engagement letters:<sup>1</sup>

Dear Encik Zakaria,

I am writing to advise you that I have decided not to represent you in suing the driver of the car that injured you in the motor vehicle accident on 1 Jan 2001. You will not, therefore, be hearing from me further about this matter. I encourage you to seek a different lawyer to represent you in pursuing your claims as soon as possible, since there are deadlines applicable to your case which, if not met, could affect your rights in bringing this claim.

I wish you success in pursuing your case.

Yours very truly,  
Messrs Annie Ting

Dear Ms. Tan,

I am writing to confirm that I will not be representing you in any matter related to your business venture with my client, MBC Sdn. Bhd. I was hired by Mr. Foo to prepare the documents for that venture and to provide him with legal advice about that venture, so he is my only client in this matter.

Although you may receive some incidental benefit from the work I do for Mr. Foo, I want to make sure you understand that I am not representing your interests in this matter. You may want to retain your own lawyer to review the documents I prepared for Mr. Foo and to otherwise provide you with legal advice about your proposed business venture with Mr. Foo.

Yours very truly,  
Messrs Annie Ting

One source of debate concerning the content of a non-engagement letter is whether the A&S should advise the person of the actual deadline(s) applicable to their case, particularly if a deadline is quickly approaching.

For example, does the A&S tell the person that the statute of limitations will bar their claim if they do not file their suit by the sixth year from the date of their accident if the accident happened 5 years ago? There is no right answer to this question. The problem, of course, with trying to advise someone about specific case deadlines is that the A&S may not have sufficient expertise or facts to identify *all* of the applicable deadlines. Some prefer not to provide advice to non-clients about specific deadlines applicable to their cases unless that deadline is imminent. By providing the person with advice about specific deadlines, the A&S may be liable if that advice is wrong or if the A&S fails to advise the person of *other* applicable dispositive deadlines.

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<sup>1</sup> These letters could be used to decline representation of a potential new client or an existing client on new matters.