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Posted: June 28, 2018

Confirming When Representation Begins Matters

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A recent decision by Division III of the Washington Court of Appeals illustrates the importance of confirming whether or not you have taken on a client at an initial meeting. *Fechner v. Volyn*, ___ Wn. App. ___, 418 P.3d 120, 2018 WL 2307703 (May 22, 2018), was painted against the backdrop of a medical malpractice case. The plaintiff was the personal representative of her late husband's estate. She believed that her husband had died as a result of being prescribed inappropriate medications. The plaintiff contended she first consulted the defendant lawyer in October 2011 about pursuing a medical malpractice claim against the doctor involved and that the lawyer had agreed orally at that time to take on her case. The lawyer, by contrast, argued that he did not begin to represent the plaintiff until August 2012 when she signed a written authorization for him to investigate the claim. The significance of the two dates is that the statute of limitation on the medical malpractice claim ran in the meantime.

In the subsequent legal malpractice case, the plaintiff argued that the limitation period had expired while the defendant lawyer was representing her. The lawyer countered that it had run before August 2012 and, accordingly, he was not liable for malpractice. In the legal malpractice case, the trial court granted summary judgment to the lawyer. On appeal, Division III found that a

fact issue on when the representation began precluded summary judgment. The Court of Appeals, therefore, reversed and remanded.

In doing so, the Court of Appeals noted that a written agreement does not necessarily mark the beginning of an attorney-client relationship if the evidence—including the client's reasonable belief—indicates that it began earlier. The Court of Appeals concluded that the plaintiff's testimony about the October 2011 consultation created a fact issue for jury resolution on when the attorney-client relationship began.

Fechner serves as an important reminder that if a lawyer meets with a potential client and does not take on the matter involved, prudent risk management practice is to confirm that in writing to the potential client. Under the controlling standard that *Fechner* identified (relying primarily on *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)), a client who is told specifically that no attorney-client relationship has been formed will have a difficult time later showing a "reasonable belief" to the contrary. Confirming the status in a contemporaneous written document—whether hard copy or electronic—will also provide a critical record if questions arise later.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.