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Posted: December 3, 2018

U.S. District Court Highlights Importance of "Non-Engagement" Letters

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A recent decision from the U.S. District Court in Seattle highlights the importance of "non-engagement" letters: a letter or other communication to a non-client involved in the background context of a representation telling the non-client that the lawyer is not representing the non-client. *Smartek21, LLC v. VisiKard, Inc.*, 2018 WL 5024031 (W.D. Wash. Oct. 17, 2018) (unpublished), involved a series of negotiations between two high tech companies over possible joint projects. Plaintiff Smartek21 was represented by counsel in the negotiations. Defendant VisiKard was not.

As the negotiations progressed, Smartek21's lawyer repeatedly reminded VisiKard's principal—in writing—that he was only representing Smartek21. Eventually, Smartek21 and VisiKard had a falling out and Smartek21 sued Visikcard to recover money Smartek21 had loaned VisiKard. VisiKard, in turn, brought a third-party complaint against the lawyer and his firm for legal malpractice. VisiKard claimed that it thought the lawyer was looking out for its interest as well and had "turned on VisiKard."

The lawyer and his firm moved for summary judgment arguing, in relevant part, that there was no attorney-client relationship between them and VisiKard—which is generally a prerequisite for a legal malpractice claim in Washington.

The District Court agreed and dismissed the lawyer and his firm. In doing so, the court relied on *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), for the proposition that simply preparing documents for a client that are then used in a transaction with a non-client does not automatically create an attorney-client relationship with the non-client.

The citation to *Bohn* underscores a more fundamental principle that the District Court implied but did not need to develop fully in light of the undisputed evidence of the multiple communications between the lawyer and VisiKard informing the latter that the lawyer was only representing Smartek21. *Bohn* articulates the basic test in Washington for whether an attorney-client relationship exists and looks at two questions: (1) does the putative client subjectively believe the lawyer is representing him or her? and (2) is that subjective belief objectively reasonable under the circumstances? (119 Wn.2d at 363.) Under *Bohn*, both elements of the test must be met for an attorney-client relationship to be recognized. When a lawyer sends a "non-engagement" letter or its equivalent, it becomes very difficult for a non-client to meet the "objectively reasonable" prong of the test regardless of what the non-client claims to subjectively believe.

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.