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 Oct. 17, 2018) (unpublished), involved a series of negotiations between two high tech companies over possible joint projects.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 VisiKard 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

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