Settlement Malpractice - Proving Actual Settlement Authority

The general rule in Kentucky is a lawyer must have express or actual authority to settle a matter before a settlement agreement is binding (*Clark v. Burden*, Ky., 917 S.W.2d 574 (1996)). Running afoul of this rule can lead to a malpractice claim. A recent 7th Circuit case shows how a lawyer was found to have actual authority to settle even though the client claimed he did not consent to settlement.

The lawyer represented the client in a discrimination suit against United Airlines alleging retaliation and denial of stock entitlements because of the client's reserve military obligations. The client annotated the lawyer's retainer agreement with a handwritten note that the lawyer had authority to settle only "with my authorization." The client believed this entitled him to nullify any agreement up until the time he signed the formal settlement agreement. After three months of negotiations the lawyers for the parties notified the court that a settlement agreement was reached. The client, however, refused to sign the agreement. An enforcement motion was then filed that the client argued should be denied because he had not authorized settlement.

In an evidentiary hearing the district court found these facts. The settlement negotiations began with a settlement conference that narrowed the issues. Over the next three months billing records showed that the lawyer called the client or his wife ten times and that either before or after each call opposing counsel was contacted. This "absolute correlation" was objective evidence supporting the lawyer's testimony that the client was informed in detail at every step in the negotiations and approved each one. Furthermore, the client did not object upon receipt of a letter from the lawyer advising him of settlement of his "current federal court case against United Airlines" or during the many times he conferred with the lawyer after receipt of the letter. The court found the lawyer had actual authority to settle and that the client's handwritten alteration to the retainer agreement did not require the lawyer's authority be in writing. His oral authorization satisfied the terms of the retainer agreement and his mistaken belief to the contrary did not entitle him to rescind a settlement agreement entered by his lawyer with actual authority (*Pohl v. United Airlines Inc.*, 7th Cir., No. 99-4007, 5/10/00).

To avoid the problem of the settlement-recanting-client risk manage settlement negotiations with these considerations in mind:

- Do not encourage false or unreasonable expectations. Compromise is hard enough to achieve with reasonable expectations.
- Discuss settlement with the client throughout the representation. It is not a sign of lawyer weakness to discuss reality with a client.

- Take plenty of time to explain the advantages and disadvantages of a legitimate offer to the client. Since settlement involves compromise, the client must process some amount of disappointment. This is easier for a well counseled client.
- Keep your client involved in settlement negotiations from start to finish. After *Clark v. Burden* getting the client's decision in writing is the safest way to consummate a settlement agreement. Document thoroughly all settlement negotiations and client discussions about settlement.
- Recognize that settlement of a divorce case does not carry with it the same finality typical of other settlements. A divorce settlement is not the end of the matter for the client Ñ rather a new beginning. Future consequences of faulty divorce settlements will reveal a lawyer's negligence with a vengeance. Many recent decisions involve divorce settlements that did not adequately cover taxation, pensions, IRAs, and valuation of real estate. *(This check list is taken from the Bench & Bar article "Unsettling Settlements." It is available on our web site at www.lmick.com.)*

Fielding Telephone Inquiries

A necessary, but often frustrating, aspect of providing legal service to the public is fielding numerous telephone calls throughout the day that can mean important new business or just be another tire kicker looking for free legal advice. There is an art to risk managing these calls to be sure that new business is encouraged, time is not wasted, and unintended attorney-client relationships with malpractice exposure are avoided. Michael M. Bowden in "How To Handle Phone Inquiries From Potential Clients" (*Lawyers Weekly USA*, 99 LWUSA 1046 (11/15/99)) recommends office procedures that screen all incoming calls, get the caller's contact information, get the names of other parties involved in the matter, and establish when the "inquiry" becomes a consultation.

A good screening technique is for a well trained secretary or paralegal to weed out calls concerning matters the lawyer does not want to take, provide the caller with information of the type of service the firm offers, explain typical fee arrangements, and ask the caller to make an office appointment or schedule a return call from the lawyer. If the caller is interested, contact information and names of other persons involved in the matter are then obtained. It should be made clear to callers that they are not yet clients of the lawyer - only the lawyer can accept the matter.

Lawyers receiving calls directly should first get contact information and the names of other persons involved before discussing facts. Since you cannot do a complete conflict check until you are off the telephone, limit the initial discussion to the essential facts necessary to evaluate whether to pursue the

retention. A good practice is to have a phone consult pad on your desk to record this information. Assign each call a consultation number and file the consult sheet chronologically in a binder. Send non-engagement letters if you choose not to take a matter and file it with the consult sheet. A good letter thanks the potential client for calling, includes any advice given along with a reminder of limitations concerns, confirms that the matter was not accepted, and encourages the person to call again.

The hardest part is controlling when an inquiry turns into a consultation with attendant duties. Since the attorney-client relationship may be implied from the circumstances without explicit acceptance of a matter by the lawyer, assure that the caller understands that the matter has not been accepted simply because the lawyer has taken the call. According to Bowden "most lawyers say the "inquiry" stage ends when the call crosses the thin line between "quick question" and full blown consultation." Some lawyers never give advice in response to a cold call. Others will if the caller has been referred by someone they know or the caller is a current or former client. Sometimes you just have to go with your intuition, but complete the consult sheet and get the contact information. Don't forget that advice given during a preliminary consultation exposes you to a malpractice claim even if you later decide not to take the matter. Keep it to a minimum until you are getting paid.

Don't Pay For Another's Error

The little known malpractice area of negligent referral of clients continues to grow. The referring lawyer should be reasonably sure the receiving lawyer is competent in the practice area the matter involves. This is true even though the referring lawyer receives no fee and has no further participation in the representation. A preliminary consultation with a potential client may be sufficient to create a duty to exercise ordinary care and skill when referring that person to another lawyer. The applicable standard of care is based on the nature of the declined representation. Often it will be enough to confirm that the recommended lawyer is licensed to practice law in Kentucky. Licensure gives rise to a presumption that the lawyer is competent and possesses the requisite character and fitness. If the declination is because the matter requires special skill or knowledge, the referring lawyer must be careful to ascertain that the suggested lawyer has the necessary competence. If the matter requires immediate action, the referring lawyer should advise that the new lawyer be consulted immediately. Recommending the right lawyer without cautioning that prompt action is necessary also can be a negligent referral.

The Clark County Bar Association developed an excellent procedure to facilitate referrals with minimal liability exposure. They collected a list of practice areas from each member lawyer, combined that information with

the lawyer's name, address and telephone number, and distributed the list to their members. When asked for a referral the lawyer supplies the requester with the list and the requester takes it from there. If any other bar would like to try this, we have sample copies of the Clark County Bar list. Just call Pete Gullett at 1-800-800-6101 and he'll take it from there.