

The Phantom Client returns

... again and again

Recent LawPRO claims have driven home to us the importance of formal retainer arrangements and avoiding the spectre of the phantom client. Unfortunately, these issues are not new. In 1991, William S. O'Hara wrote an article for the *Law Society of Upper Canada Errors and Omissions Bulletin* entitled "Beware of the Phantom Client." He wrote:

Of all the hazards of practising law in the late twentieth century none is more bone chilling than the phantom client who drifts into our office like an apparition, speaks to your briefly, and then disappears into the mists of time. The phantom reappears only when forgotten, to haunt you and point a bony finger at you...

A phantom client is almost always the victim of a loss by house fire, car crash, slander or anything else involving a limitation period. The apparition will always appear before the limitation period has expired. The first meeting is usually a short introductory session when the client explains the problem, asks whether you could help, and how much it would cost.... Often the client will set up an appointment to show you the policy and give you a retainer. The appointment is missed. ...

You may write to the client to set up another meeting or you may phone when the client is out of town. As the weeks pass the phantom client becomes a fading memory – the client who did not come back.

When the phantom client reappears to ask how the case is going you

cannot recall the client's name. There is no case at all and the limitation period has passed....

The only way to avoid this type of claim is at the time the client is first in your office, or has just failed to show up for a follow-up appointment. After that it is too late. The way to avoid this type of claim is simple. Write to the potential client (or better yet have the client sign a form in your office) saying that you will not be retained until you receive written instructions or a monetary retainer. At the same time advise the client that if you are not retained, another lawyer should be consulted immediately because of the limitation period involved. Following these simple steps will protect you from the return of the phantom client and its plaintive calls for help....

This advice is as appropriate today as it was eighteen years ago.

Although not a recent claim, the Ontario Court of Appeal decision in *Coughlin v. Comery*, [1998] O.J. No. 4066 (Ont.C.A.), (www.canlii.org/en/on/onca/doc/1998/1998canlii1222/1998canlii1222.html) provides some guidance. This case supports the proposition that the onus is on the solicitor who seeks to limit the scope of his/her retainer, and where there is an ambiguity or doubt it will, generally, be resolved in favour of the client. Fortunately for the solicitor, he was able to demonstrate that he was retained solely to pursue his client's claim for disability benefits. He was NOT retained to prosecute his client's tort

claim. Although LawPRO successfully defended the solicitor, it was a very costly and time-consuming lawsuit. The lesson: If a lawyer accepts a retainer, he or she should carefully document the scope of that retainer.

The red flags should also go up when one family member wishes to retain a solicitor not only on his own behalf, but purportedly on behalf of other family members. A solicitor cannot assume that it is safe to accept such instructions. The "instructing" client may have no authority to retain counsel on behalf of anyone else. Or he may have a conflict of interest with the other family members, making it impossible for counsel to represent everyone. A recent example of this scenario is *Gallop v. Abdoulah*¹ matter.

Lawyers must be vigilant about documenting the existence or non-existence of retainers. If a lawyer gives advice on the telephone, she should record what advice was given. If a retainer is accepted, he should document the scope of the retainer. If a family member purports to instruct a solicitor on behalf of others, the solicitor must carefully consider whether to accept these instructions.

We are now in a new century, but these types of claims remain a perennial difficulty. The phantom client is still with us. Be aware, and take steps to protect yourself if the phantom client reappears.

Debra Rolph is director of research, Claims at LAWPRO.

¹ *Gallop v. Abdoulah*, [2006] 8 W.W.R. 631 (Sask.C.A.), www.canlii.org/en/sk/skca/doc/2006/2006skca11/2006skca11.html