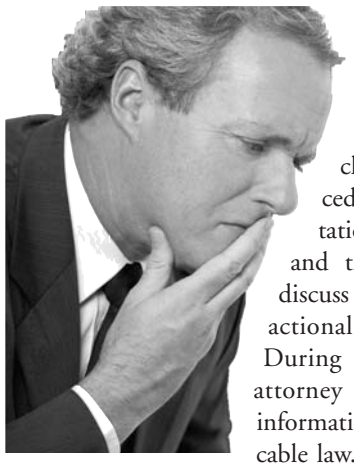
Can an Attorney be Liable for Harm Resulting from Misinformation Given to a Prospective Client?



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Typically, creation of a new attorney/client relationship is preceded by an initial consultation between the lawyer and the potential client to discuss the legal case or transactional matter in question. During the consultation an attorney may offer advice or information based on the applicable law. But in some instances the interview process does not lead to an attorney/client relationship, either because the client has decided not to retain the lawyer or because the lawyer has decided that he or she does not want to take on the client, regardless of the reason. But what if, in the course of the interview, the lawyer provides incorrect information and the prospective client later relies upon that information to his or her detriment? Can the lawyer be liable to the former prospective client notwithstanding that an attorney/client relationship never developed? A recent Colorado case considered this issue in a context where a statute of limitations on personal injury was missed because the lawyer allegedly had incorrectly told her prospective clients that the applicable statute of limitations was for a longer period than it actually was.

In *Allen v. Steele,* 252 P. 3d 276 (Co. 2011), the prospective clients had consulted the lawyer about taking on their representation for a personal injury claim arising out of a motor vehicle accident. The prospective clients later alleged that their claims became time barred because the lawyer had advised them that the applicable statute of limitations is five years, although in fact it is three years under Colorado law, and that they had relied upon that advice in waiting too long to consult another lawyer. After learning that they had blown the applicable statute of limitations on their personal injury claim, the former prospective clients brought suit against the lawyer, whom they admitted they had not retained.

At the trial court level the former prospective clients alleged two legal theories: professional negligence (i.e., legal malpractice) and negligent misrepresentation. Because, generally speaking, one of the elements of a legal malpractice claim is the existence of an attorney/client relationship, the trial court dismissed the legal malpractice claim because the former prospective clients acknowledged that they had never retained the lawyer.

Under Section 522 of the Restatement (Second) of Torts (1977), which has also been adopted as the law in Pennsylvania: "[t]he elements of a claim of negligent representation are [that] 1) one in the course of his or her business, profession or employment; 2) makes a misrepresentation of a material fact, without reasonable care; 3) for the guidance of others in their business transactions; 4) with knowledge that his or her representations will be relied upon by the injured party; and 5) the injured party justifiably relied on the misrepresentation to his or her detriment." The trial court also dismissed the negligent misrepresentation claim on the basis that the alleged bad advice, which was given about a potential lawsuit, did not satisfy the element for the guidance of others in their business transactions. (A common example of business advice would be where a seller's attorney issues a formal opinion containing an error upon which a buyer is knowingly relying.)

The former prospective clients appealed to the court of appeals, Colorado's intermediate appellate court, but only from the dismissal of the negligent misrepresentation claim and not of the legal malpractice claim. The court of appeals reversed, finding that the alleged facts did support a negligent misrepresentation claim. That court justified its ruling by application of Section 15(1)(c) of the Restatement (Third) of The Law Governing Lawyers (2000), "which requires attorneys to exercise reasonable care when providing legal services to prospective clients." The pertinent portion of Section 15(1)(c) provides:

> (1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must …
>
> (c) use reasonable care to the extent the lawyer provides the person legal services.

The Supreme Court of Colorado, sitting en banc, reversed without dissent. It found that "[t]he 'guidance of others in their business transactions' element means that the defendant attorney provided information to guide others, meaning, to guide the recipient of the information, in his or her business transactions." For purposes of this tort, the court found that "business transactions" should be given its ordinarily understood meaning. It noted a comment to Section 522 of the Restatement (Second) of Torts, which discusses liability in terms of "commercial transactions" and states that "[b]y limiting the liability for negligence of a supplier of information to be used in commercial transactions … the law promotes the important social policy of encouraging the flow of commercial information upon which the operation of the economy rests." The court also noted that case law in other jurisdictions also has limited this tort to instances involving "commercial transactions," although there is some contrary case law as well. In short, in the court's view, consultation on a potential civil suit to pursue a personal injury claim does not involve a "business transaction."

The court rejected application of Section 15(1)(c) of Restatement Third because it "imposes liability for mal-

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practice in the absence of an attorney-client relationship, which contravenes Colorado law." It noted that Section 15(1)(c) has never been adopted in Colorado (nor has it been adopted in Pennsylvania) and that a completely separate section of the Restatement Third (Section 51(2)) addresses negligent misrepresentation. It found that application of Section 15(1)(c) "blurs the distinction" between the duties owed to a prospective client and duties owed to a client. Otherwise, "prospective clients could make legal-malpractice-like claims under the guise of negligent misrepresentation, to circumvent the requirement to prove an attorney-client relationship, a necessary element of the tort of legal malpractice."

Sound practice would indicate that the lawyer should decline representation with a declination letter that accurately states the applicable statute of limitations and how it applies to the matter in question. But the decision in *Allen* would suggest the possibility of liability for negligent misrepresentation, but not for legal malpractice, if the erroneous advice related to a commercial matter.