

GENERAL PRACTICE

LEGAL MALPRACTICE IN LIGHT OF TOGSTAD — LIABILITY FOR CURBSTONE OPINIONS?

By

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INTRODUCTION

On April, 11, 1980, the Minnesota Supreme Court decided the celebrated legal malpractice case of *Togstad v. Vesely, Otto, Miller & Keefe*.[Ftn 2](#) The *Togstad* decision, holding the defendant lawyers negligent in improperly advising a wife about her husband's alleged medical malpractice claim, has received considerable attention. The purpose of this article is to analyze *Togstad* and provide practical suggestions for guarding against its consequence.

FACTS OF THE TOGSTAD CASE

The Alleged Medical Malpractice

John Togstad was admitted to a hospital on August 16, 1971, where tests disclosed that his severe headaches were caused by a large aneurysm. A clamp was surgically implanted on August 27, 1971, in Mr. Togstad's neck to allow the gradual closure of the artery.[Ftn 3](#)

One of the risks associated with the procedure is that paralysis may result if the brain does not receive an adequate flow of blood. If the blood supply becomes so low as to endanger the patient's health, the clamp can be adjusted to establish proper blood circulation.[Ftn 4](#)

Two days after implantation, a nurse observed that Mr. Togstad could neither speak nor move, and called a resident physician, who did not adjust the clamp. Mr. Togstad's primary physician arrived an hour later and promptly opened the clamp, but Togstad suffered paralysis in his right arm and leg and is unable to speak.[Ftn 5](#)

Mrs. Togstad became suspicious about her husband's treatment "due to the conduct and statements of the hospital nurses shortly after the paralysis occurred".[Ftn 6](#) She noticed that nurses were "'upset and crying'" and that her husband's condition "'was a topic of conversation'".[Ftn 7](#) One nurse told her that Mr.

Togstad was fine at 2:00 A.M., but when she returned at 3:00 A.M., he was unable to move or speak.[Ftn 8](#)

Consultation with the Law Firm

About fourteen months after her husband's hospitalization, Mrs. Togstad met with Attorney Jerre Miller about her husband's condition. The appointment was made by Mr. Togstad's former work supervisor who knew the defendant through a local luncheon club. Neither Mr. nor Mrs. Togstad had any prior contact with the firm.[Ftn 9](#)

Mrs. Togstad testified that she went to the law firm for legal advice "what to do, where shall we go from here?"[Ftn 10](#) She said that she told the defendant "everything that happened at the hospital", and "about the procedure and what was undertaken, what was done, and what happened."[Ftn 11](#) She brought no records with her, but the defendant took notes and asked questions during the 45-minute meeting. At its conclusion, Mrs. Togstad said Miller advised her "he did not think we had a legal case, however, he was going to discuss this with his partner."[Ftn 12](#)

When she did not hear from the firm after a few days, she decided that they had concluded there wasn't a case. There were no fee arrangements, no medical authorizations, and Mrs. Togstad was not billed for the interview.[Ftn 13](#)

Although the defendants did agree with most of the basic facts alleged by Mrs. Togstad, there were some significant differences. While the plaintiff alleged that she was seeking the legal opinion of the defendant about whether there was a viable claim, the defendant argued that he was merely asked whether "she had a case that our firm would be interested in undertaking."[Ftn 14](#) At trial, however, the defendant did testify that Mrs. Togstad was "there to see whether or not she had a case and whether the firm would accept it."[Ftn 15](#)

The defendant also claimed that he told Mrs. Togstad "that because of the grievous nature of the injuries sustained by her husband, that this was only my opinion and she was encouraged to ask another attorney if she wished for another opinion" and "she ought to do so promptly."[Ftn 16](#) This was denied by Mrs. Togstad, as was the defendant's claim that he advised her that his firm did not have expertise in medical malpractice.[Ftn 17](#)

Mrs. Togstad did not consult another attorney until one year after she talked to the defendant because of her claimed reliance upon the defendant's "legal advice" that they "did not have a case"[Ftn 18](#)

Expert Testimony

At the trial, each of the parties called expert witnesses. The plaintiffs' expert testified that "in rendering legal advice regarding a claim of medical malpractice, the 'minimum' an attorney should do would be to request medical authorizations from the client, review the hospital records, and consult with an

expert in the field.”[Ftn 19](#)

One of the defendants’ experts testified that when an attorney is asked whether he will take a case, his only responsibility in refusing it “is to so inform the party.”[Ftn 20](#) He did say, however, that if an attorney is asked a legal opinion on the merits of a malpractice claim, he should check hospital records and consult with an expert before giving an opinion.[Ftn 21](#)

The second defense expert testified that when a person consults him about a medical malpractice action, he has to make a decision “as to whether or not there probably is or probably is not, based upon that information, medical malpractice.”[Ftn 22](#) If there is not, he continued, he would then inform the client but would never render a “categorical” opinion.[Ftn 23](#) He did acknowledge that if he were consulted for a legal opinion regarding medical malpractice fourteen months after the questioned incident, “ordinary care and diligence” would prompt him to tell the party about the two-year statute of limitations.[Ftn 24](#)

Trial Result

The jury submitted a special verdict finding the hospital and the doctor negligent and finding that the doctor’s negligence was a direct cause of Mr. Togstad’s injuries. The jury also found an attorney/client relationship between Mrs. Togstad and the defendant, that the defendant was negligent in rendering advice regarding the possible claims of the Togstads, and but for his negligence, they would have been successful in their action against the doctor. The jury also found that the Togstads were not negligent in pursuing their claims against the doctor. Mr. Togstad was awarded \$610,500, and Mrs. Togstad \$39,000.[Ftn 25](#) The Supreme Court affirmed the denial of a motion for judgment notwithstanding the verdict.

THE LEGAL MALPRACTICE ISSUES ON APPEAL

The Court noted that in a legal malpractice action, there are four necessary elements:

1. An attorney/client relationship;
2. Negligence by the defendant *or* breach of contract;
3. The negligence or breach of contract must be the approximate cause of the plaintiffs’ damages; and
4. But for the defendant’s conduct, the plaintiffs would have been successful in the prosecution of their claim.[Ftn 26](#)

Either tort or contract may serve as a basis for legal malpractice liability. In fact, some commentators have characterized malpractice suits as being neither in contract nor in tort, but as lying in a “borderland” area between the two.[Ftn 27](#)

The Court observed that many of its recent legal malpractice decisions have analyzed the

attorney/client considerations in contractual terms. Under the contract theory, the basis of liability is the reliance by the recipient on the advice given.

In *Togstad*, the trial court applied a contract analysis in ruling on the attorney/client relationship question. One statement of the contract analysis is as follows:

“Generally speaking, the relation of attorney and client is a matter of contract . . . A valid offer and acceptance will constitute the relation of attorney and client. Thus, the contract of employment, in general, consists of an offer or request by the client and an acceptance or assent by the attorney . . . Formality is not an essential element of the employment of an attorney. The contract may be *express* or *implied* and it is sufficient that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession. An acceptance of the relation is implied on the part of the attorney from his acting in behalf of his client in pursuance of a request by the latter. (Emphasis supplied.)[Ftn 28](#)

The Court noted that one law review comment suggested that the proper analysis in *Togstad* was to apply principles, of negligence. Under such an analysis, liability arises if the defendant renders legal advice under circumstances which make it reasonably foreseeable to him that if such advice is negligently given, the individual receiving it may be injured.[Ftn 29](#)

After discussing the alternative theories of liability, the Court refused to base its decision on either analysis, but instead held that “under either theory the evidence shows that a lawyer/client relationship is present here.”[Ftn 30](#)

REACTION TO TOGSTAD

Togstad has been greeted with apprehension by the bar. It has also been the subject of considerable commentary.[Ftn 31](#) The decision even evoked an unusual expression of sympathy for the profession from a lay source, who said he would be “worried sick” if he were a member of a Minnesota professional partnership, and added:

“How can we expect professional people to serve the public prudently, wisely and fully professionally with that kind of an ax hanging over their heads?

The alternative of course is to load up the firm with vast insurance coverages the cost of which, inevitably, must be passed on to the public in the form of higher fees and to conduct the practice with an exhaustive and costly pursuit of and study into every possible contingency that might develop . . . a kind of defensive sort of practice in the face of the malpractice suit threat.

And we wonder why professional service costs keep rising.”[Ftn 32](#)

The remainder of this article will focus on preventing malpractice in Togstad situations.

Rejecting the Case on the Merits

One commentator, in an article written prior to the Supreme Court's decision in *Togstad*, described its significance as follows:

"The fundamental proposition underscored by the Minnesota case is that a lawyer cannot reject any case brought to him for consideration by a potential client on the basis of the lawyer's judgment as to the merits of the case *unless* the lawyer makes a careful investigation of the facts and the legal issues involved. If the plaintiff's position in the Minnesota case is sustained, it will be forcibly brought home that any 'undertaking' to advise a party professionally brings into play all of the lawyer's professional responsibility to a client." [Ftn 33](#)

In *Togstad*, the posture of the case required an assumption by the Court that Mrs. Togstad sought and received legal advice from the defendant. In rendering the advice, the defendant appeared to the client to be rejecting the case on the merits.

According to plaintiffs' experts, consultation with an expert and review of medical records is an absolute minimum which should be performed by the attorney before an opinion on the merits is rendered. [Ftn 34](#) The general rule, as stated by the Court, is that an attorney must "perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice." [Ftn 35](#)

It thus appears from *Togstad* that in any situation where an attorney undertakes to render an opinion on the merits of a case, he will be required to do more or less, depending upon the exact nature of the case. In a commercial case, where the facts may be clear, legal research may be sufficient. In other cases, both factual investigation and legal research may be required. In other cases, such as medical malpractice cases, an attorney may need to go even further, and consult with experts in the particular field. In any event, 'the attorney must' perform the minimal acts which a reasonably prudent lawyer would perform before rendering an opinion on the merits of the case.

Rejecting the Case Other than on the Merits

In *Togstad*, the client and the attorney differed on the nature of the opinion rendered by the attorney. The client felt, the jury found, and the Supreme Court assumed, that the lawyer rendered legal advice concerning the merits of the case. The attorney argued that the advice given was merely concerning whether the case was one which the firm was interested in accepting.

There are, of course, many settings in which an attorney may decline proffered employment and in which the refusal has nothing to do with the merits of the case. There may be ethical conflicts of interest, the attorney may not do the kind of work involved in the offered case, the attorney may be too busy to handle the matter, or he may simply desire to avoid the case without having a specific reason.

One of the defendant's experts testified that when a lawyer refuses a case, his only duty is to inform the client if the refusal is for reasons other than the merits of the case. It appears from *Togstad*, however, that more is required. It has been suggested that if a case is rejected other than on the merits, the fact that it is so rejected must be communicated to the client.[Ftn 36](#)

It has also been suggested that besides communicating the exact reasons for the rejection of the case, if it is rejected other than on the merits, the person should be advised to consult another attorney, and should be advised about the statute of limitations which applies to the case, or "at a minimum, that the passage of time may cut off the right to bring the case."[Ftn 37](#)

The Necessity of a Writing

One commentator has stated as follows:

Finally, there is no escaping the clear message of the Minnesota case, which is that in all events a letter must be written."[Ftn 38](#)

The initial reaction of many practitioners to this statement must inevitably be "why?". Secondary considerations must be to whom such writing should be sent, and what they should contain.

The differences in the testimony of the client and attorney in *Togstad* clearly indicate the primary reason for sending a letter. A carefully drafted letter may be both a source of advice to the recipient as well as a record of what transpired between the recipient and the attorney. In cases where the recollection of the attorney and the recipient differ, the letter may resolve the conflict.

To whom should such letters be sent? Office visitors and drop-ins? Yes. Telephone callers? Probably. Curbstone contacts? Possibly. In short, the letter should be sent to anyone to whom statements were made which could reasonably be interpreted as legal advice upon which a reasonable person might rely, or as a result of which, if such statements were made negligently, the individual receiving them might be injured.[Ftn 39](#)

In all cases where employment is declined, the client should be advised of the reason for declining the employment. In other words, it should be clear to the client whether the decision to reject the case is based upon the attorney's opinion about its merits or for other reasons. Whatever the reasons for declining the case, it also seems advisable to mention the applicable statute of limitations. In mentioning the statute of limitations, the client should clearly be advised that once the deadline passes, it is likely that no lawsuit will ever be possible. Where there are questions about the statute of limitations, it may be best to discuss those briefly, and indicate to the client the "conservative" estimate of when the statute expires.

It is always desirable to suggest to a person whose case has been rejected, for whatever reason, that another attorney may or should be consulted. As desirable as it is in cases where the case is rejected on the

merits, such as suggestion is crucial in cases where the attorney has rejected the case for reasons other than its merits.

While the foregoing would seem to be minimal ingredients of rejection letter, other information may be desirable. It may be desirable for the lawyer, in summary form, to state the times and content of the recipient's conversations and contacts with the lawyer. If the lawyer is rejecting the case on the merits, a statement of the facts as he understands them and a summary of his research, consultations, and investigation is desirable.

It should be noted that the rejection of a case is not the only event in which a letter is desirable:

"The thought is that every new client contact should be followed up promptly with a letter which describes exactly what the lawyer has undertaken to do. This letter would include reference to significant follow-up actions to be taken by the client; any limitations on the lawyer's undertaking; major factual assumptions; and reference to fee and cost arrangements." [Ftn 40](#)

CONCLUSION

Togstad has real ramifications for Minnesota attorneys. Before rendering an opinion rejecting a case on its merits, an attorney may be required to do legal research, factual investigation, and consult with experts. If the case is rejected other than on its merits, the attorney may still be required to advise the rejected client about the statute of limitations and to suggest that another attorney be consulted promptly. In all cases of rejection, and indeed in cases of limited acceptance, the attorney should formally communicate his decisions, their bases, and the minimal advice required by *Togstad* to the clients in writing.

To some, these suggestions, especially the formal written requirement, may seem burdensome. The essential common ingredients, if not the specific contents, of rejection letters should, however, be fairly easy to standardize in a law office. The alternative, as the defendants in *Togstad* found, is a substantial pecuniary penalty.

FOOTNOTES

¹ The opinions expressed herein are the personal opinions of the writer, and should not be attributed to the Lawyers Professional Responsibility Board. The author also expresses thanks to St. Paul attorney Terry L. Wade and to third-year law student Richard Harden for their assistance and suggestions.

² 291 N.W. 2d 686 (1980).

³ *Id.* at 689.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 690.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Id.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 691.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 690-91.

¹⁸ *Id.* at 690.

¹⁹ *Id.* at 691-92.

²⁰ *Id.* at 692.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; See also *Christy v. Saliterman*, 288 Minn. 144, 179 N.W. 2d 288 (1970).

²⁷ Prosser, *The Borderland of Tort and Contract, and Selected Topics on the Law of Torts*, 380 (1954).

²⁸ 7 C.J.S., *Attorney and Client*, §65.

²⁹ *Togstad* at 693, citing *Comment, Attorney Malpractice: Use of Contract Analysis to Determine the Existence of An Attorney/Client Relationship*, 63 Minn. L. Rev. 751 (1979).

³⁰ *Togstad* at 693.

³¹ See, e.g., 63 Minn. L. Rev. 751, *supra*; Gates, *The Minnesota Malpractice Case, Legal Malpractice Review*, (May-June, 1980) (St. Paul Fire and Marine Insurance Company).

³² Tilton, "Something Else to Worry About", West St. Paul Sun (Aug. 6, 1980).

³³ Gates, *supra*. at 31.

³⁴ *Togstad* at 691-93.

³⁵ *Id.* at 692.

³⁶ Gates, *supra*. at 31. Although the focus of this article is on legal malpractice, it is interesting to note that the proposed Model Rules of Professional Conduct now pending in the ABA could have an impact in this area. Rule 1.15(c) is proposed as follows:

"(c) A lawyer may limit the nature and purposes of the representation provided to a client if: (1) the client's interest will not be materially impaired by the limitation; and (2) the limitation is adequately disclosed to the client before the representation is undertaken."

Arguably, to the extent that an attorney has "undertaken" to reject a case on the merits, his responsibility to the client cannot be limited. If he desires to limit his liability in an "undertaking" to reject a case other than on the merits, it would seem that he must make adequate disclosure to the client.

³⁷ Gates, *supra* at 31.

³⁸ *Id.*

³⁹ *Togstad, supra*. at 693, f.n. 4.

⁴⁰ Gates, *supra*. at 31.