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ISSUE: Formation of the attorney client relationship

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RISK MANAGEMENT NOTE:

The first element in a claim for attorney malpractice is that an attorney client relationship existed between the parties. A court may find that such a relationship was formed under potentially broad circumstances, if the client objectively and reasonably believed that the lawyer was the client's attorney. Practitioners can and should take some simple steps to limit the chance of exposure to a claim that a relationship existed where, in fact, the lawyer did not intend one at the time.

ARTICLE

Introduction

If it ever was true that an attorney client relationship was created only when the attorney and client formally contracted to enter into such a relationship, such as signing a retention letter or sending and receiving payment for a bill, those days have passed. Courts are increasingly likely to imply a relationship sufficient to support a malpractice claim under circumstances when the lawyer may have had no intention of forming one. No clear test exists for determining when an implied attorney-client relationship is formed, perhaps because every situation is different.¹ However, the trend of the case law is that such a relationship may be found to exist when a client reasonably believes that an attorney has become her lawyer and reasonably relies upon advice given by the attorney.²

¹ See Douglas K. Schnell, *Note: Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship*, 17 Harv. J. Law & Tech. 533, 538 (2004) ("Schnell").

² This article does not address the related question of when an attorney can be held liable for negligence to a third party non-client. For more information, see, e.g., Annotation, *Attorney's Liability to One Other than Immediate Client, for Negligence, in Connection with Legal Duties*, 61 A.L.R. 4th 615 (1988). There is also a trend to hold lawyers responsible for duties to prospective

The Implied Attorney-Client Relationship

The leading case on implied attorney-client relationships is *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980). In *Togstad*, the parties never discussed fee arrangements, never exchanged correspondence, and the attorney took no formal action on the plaintiff's behalf. During a meeting at the attorney's office that lasted no more than an hour, the plaintiff described how her husband had suffered a stroke after surgery. At the end of the meeting the attorney told her that he did not think there was a case, but he would discuss it with his partner. She expected him to call her if he changed his mind. When he did not call, she assumed there was no case. Later, she consulted another lawyer. By that time, the statute of limitations had expired, so she sued the first lawyer for malpractice.

The jury found that there had been an attorney-client relationship and awarded her nearly \$650,000. The Supreme Court affirmed on the ground that an attorney-client relationship could be established under either a contract or a reliance theory. Since she received advice from the lawyer under circumstances which made it reasonably foreseeable to the lawyer that she would be injured if the advice were negligently given and she reasonably relied upon the lawyer's advice in failing to pursue the claim, the verdict was upheld.

Togstad does not stand alone. Other courts have implied an attorney-client relationship. In *Matter of Petrie*, 154 Ariz. 295, 742 P.2d 796, 800 (1987), the Arizona Supreme Court stated that an attorney-client relationship may be implied from the parties' conduct. The relationship arises when the person seeks and receives advice and assistance from the attorney in matters pertinent to the legal profession. In determining reasonableness the court looks to the nature of the work performed and the circumstances under which the confidences were divulged.³ In *Moen v. Thomas*, 682 N.W.2d 738 (N.D. 2004), the court held that an attorney-client relationship in a malpractice case is established when a party seeks and receives advice and assistance from an attorney on matters pertinent to the legal profession. The client's belief that the relationship exists must be objectively reasonable. As in *Petrie*, the *Moen* court stated that it would consider the work performed and the circumstances under which the confidences were divulged.

Courts in other jurisdictions have adopted a multipart standard that combines elements of contract and tort/reliance principles. Under this standard, an attorney-client relationship is formed when: (1) the purported client sought

clients and others with whom the lawyer did not have a formal relationship. This trend is found in both the recently revised Rule 1.18 of Model Rules of Professional Conduct and the Restatement (Third) of Lawyers, section 15.

³ The focus on "confidences divulged" suggests that this standard arose from cases considering the formation of an attorney-client relationship in the context of a disqualification motion. Arguments could be made that the standard for disqualifying a lawyer should be less stringent than the standard for subjecting the lawyer to malpractice liability.

advice or assistance from the attorney; (2) the assistance sought was within the attorney's professional competence; (3) the attorney expressly or impliedly agreed to provide such assistance; and (4) it is reasonable for the purported client to believe that the attorney was representing him. *Capitol Surg. Supp., Inc. v. Capitol Marketing Grp.*, 2004 U.S. App. LEXIS 1337 (3rd Cir. 2004) (citing *Atkinson v. Haug*, 424 Pa. Super. 406, 622 A.2d 983 (1993)); see also *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977). The attorney's implied agreement may be established by proof of the client's detrimental reliance, such as when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it.

The Importance Of Objectively Reasonable Reliance In The Implied Attorney-Client Relationship

As a New York case illustrates, a plaintiff cannot demonstrate the existence of an attorney-client relationship simply by claiming he believed it exists; rather, the belief has to be reasonable. In *Knigge v. Corvese*, 2001 U.S. DIST. LEXIS 10254 (S.D.N.Y. 2001) (which did not arise in the context of a legal malpractice claim), the parties disputed the custody of a child born in the Netherlands. The father sought to disqualify a New York lawyer representing the mother for her association with William Hilton, a California lawyer who was an expert on intentional child custody. A year before, the father had left several voice mails for Hilton in which he provided information about his case and asked Hilton to call him back. Hilton never returned the calls. He claimed, further, that he had not read e-mails the father sent him. The court stated,

A party's 'unilateral belief' that he is represented by counsel 'does not confer upon him the status of client unless there is a reasonable basis for his belief.' . . . Even accepting *Corvese's* assertion that he believed he had an attorney-client relationship with Hilton, the Court does not find this belief to be reasonable.

See also *Guiyang Bearing Factory v. Guidon, Inc.*, 1997 U.S. Dist. LEXIS 21384 (W.D. Mich. 1997) (court rejected the plaintiff's argument that an attorney-client relationship could arise based upon the plaintiff's claimed belief citing *Scott v. Green*, 140 Mich. App. 384, 400, 364 N.W.2d 709 (1985)).⁴

Merely offering advice is not sufficient to create an attorney-client relationship. A distinction should be drawn between responding to specific questions and offering advice based upon on specific facts, versus answering general questions, such as in a social setting.⁵ Again, the client's belief that the lawyer is intending to enter into a relationship and provide legal advice must be

⁴ AS relationship may be implied, at least for purposes of a disqualification motion, even if the attorney does not provide legal advice. See *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2D 1311 (7th Cir. 1978)

⁵ See Schnell, p. 544.

reasonable. This test for reasonable reliance should look at both the circumstances under which the advice was given and the content of the advice.⁶

Thus, the context in which the advice was given is crucial, as illustrated by *Douglas v. Monroe*, 743 N.E.2d 1181 (Ind. App. 2001). In *Douglas*, the plaintiff's son died in a swimming pool accident at a university gym. Shortly after the accident, the plaintiff's brother saw the defendant lawyer, a high school classmate, in the lobby of a bank. The lawyer told him that the statute of limitations was two years, but she did not mention that the claim at issue required notice to the government entity within 180 days. The plaintiff accordingly took no action until after the 180-day period expired. The court found that no relationship had been established. The *Douglas* court did not cite *Togstad*. However, the *Douglas* court could have distinguished the Minnesota case by noting that in *Togstad*, the attorney met with the plaintiff in his office for more than hour, obtained detailed information regarding the case, and expressed an opinion about the merits of the case. By contrast, in *Douglas* the plaintiff herself did not speak with the lawyer; instead her brother did so only in passing in a lobby, and it does not appear he gave the lawyer much information regarding the circumstances of the accident. Accordingly, the plaintiff's reliance on the lawyer's statement was less reasonable in *Douglas* than in *Togstad*.

The Restatement (Third) of the Law of Lawyers

As the above discussion illustrates, the case law contains no single standard to establish when an attorney-client relationship is formed. The drafters of the Restatement (Third) of the Law of Lawyers, however, have promulgated a test:

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
 - (a) the lawyer manifests to the person consent to do so; or
 - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.

⁶ *Id.* As a drastic example, if in the *Togstad* case the potential client claimed she had acted on advice from the lawyer to alter medical records regarding her husband, no one would consider reliance on such alleged "advice" to be reasonable.

Restatement (Third) of the Law of Lawyers, § 14. The client's intent, as well as the lawyer's consent, can be explicit or implied from the circumstances. *Id.*, comments *c* and *e*. Even if the lawyer does not communicate a willingness to represent a person, an attorney-client relationship may arise when the lawyer knows or should know that the person reasonably relies upon the lawyer to provide services and the lawyer does not inform the person otherwise. *Id.*, comment *e*.⁷ Finally, the Restatement states that lawyers can answer general questions about the law without giving rise to an attorney-client relationship. *Id.*, comment *c*.

Practical Advice

In all this, the key question may be simple. The primary reason clients hire lawyers is so that the lawyer can help them solve legal problems and explain to them how the law applies in a given situation. To the extent a lawyer does so, even to someone whom the lawyer may not consider to be an actual client, that person is likely to rely upon the explanation, and a court is correspondingly likely to find the existence of an attorney-client relationship, whether express or implied.⁸

This rationale suggests some simple, common sense, steps to limit exposure:

1. Avoid "off the cuff" opinions. General "cocktail party" statements regarding the law are safe. But any time a lawyer does anything that can be construed as applying the law to a specific person's circumstances, that lawyer is risking the creation of an attorney-client relationship.
2. Consistently document all actual attorney-client relationships with retention letters that state the terms of the engagement in accord with local principles governing such agreements. Separate matters call for separate retention letters.
3. Document all contacts with persons seeking legal advice, whether or not such contact results in the formation of a formal relationship.
4. Anytime a potential client begins to discuss his or her situation, be extremely careful. Not only must you guard against conflict situations, such discussions can all too easily include your opinions about that person's circumstances and the merits of the case. Avoid expressing any such opinions until you are sure the case is one you wish to take on.

⁷ In the same vein, the North Dakota Supreme Court stated, "a lawyer who knows an individual believes an attorney-client relationship exists, even if that belief is unreasonable, should disabuse the individual of that belief." *Moen v. Thomas*, 682 N.W.2d 738, 743 (N.D. 2004) (citing 1 Mallen & Smith, *Legal Malpractice*, § 8.2 (5th ed. 2000)).

⁸ See generally Schnell, *supra*.

5. If a potential client comes in to discuss a case and you decide not to take it, confirm your decision in writing as soon as possible. The letter or memo should advise the person to consult another lawyer, sooner rather than later, since delay and possible statutes of limitation could negatively affect the person's legal situation.

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