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The Creation of the Attorney-Client Relationship: An Emerging View

RONALD I. FRIEDMAN*

INTRODUCTION

In recent times, the increasing complexity of the law has resulted in an increasing complexity of lawyer-client relationships. As the influence of attorneys pervades society in both traditional and nontraditional ways, the number of roles attorneys are called upon to perform proliferates almost endlessly. The attendant blurring of traditional relationships has created difficulty for the legal system as it evaluates the conduct and standards of attorneys.

This Article examines the creation of the attorney-client relationship. It first addresses the significance of finding such a relationship to exist. It next reviews the creation of the relationship from a traditional perspective, and then goes on to examine and analyze the recent decisions which create attorney-client relationships informally and in nontraditional ways. These decisions demonstrate a remarkable evolution away from the traditional conceptualization.

The final frontier, the extralegal relationships of attorneys, is examined last. The courts have experienced great difficulty in fashioning solutions to the multiple roles which many attorneys play. A test will be proposed to lead the way out of the thicket. Overall, the view that the traditional relationships of attorneys and clients have greatly changed emerges clearly.

I. THE SIGNIFICANCE OF THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP

Although the question of whether or not an attorney-client relationship exists may arise in a variety of contexts, there are basically six situations in which the provable existence of an attorney-client

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relationship takes on significance. These six are: the legal malpractice lawsuit; the client's attempt to be compensated from a clients' security fund; the attorney's attempt to claim an attorney's lien; the attempt by a third party to establish the attorney's authority, actual or apparent, to bind the client; the petition to appropriate authorities to have the attorney disciplined; and, evidentiary matters relating to the attorney-client privilege.[1]

It is generally held that an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice suit.[2] This is essential in establishing the element of duty that is necessary to every lawsuit based upon a theory of negligence.[3]

The eligibility of a client to be reimbursed from a clients' security fund also depends upon the establishment of an attorney-client relationship. Clients' security funds are generally operated by courts or bar associations for the benefit of clients whose lawyers have misappropriated the clients' money or property.[4] There is clearly a public relations aspect to the clients' security fund which is commonly viewed as a responsibility of the profession.[5] The typically stated purpose of the fund is to maintain the integrity and protect the good name of the legal profession. In light of this goal, it seems clear that

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1. *See infra* notes 2-13 and accompanying text. The variety of situations in which the question of the existence of an attorney-client relationship arises appears to be endless. *See, e.g.*, Hedgebeth v. Medford, 74 N.J. 360, 378 A.2d 226 (1977) (holding that the state of New Jersey could be required to deduct a *pro rata* share of counsel fees notwithstanding the lack of an attorney-client relationship between the state and private attorneys). *See also* Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970); Ronnigen v. Hertogs, 294 Minn. 7, 199 N.W.2d 420 (1972); Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966); Shropshire v. Freeman, 510 S.W.2d 405 (Tex. Civ. App. 1974); Transcontinental Ins. Co. v. Faler, 9 Wash. App. 610, 513 P.2d 864 (1973).

2. Connelly v. Wolf, Block, Schorr & Solis-Cohen, 463 F. Supp. 914 (E.D. Pa. 1978); McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968); Herston v. Whitesell, 348 So. 2d 1054 (Ala. 1977); Banerian v. O'Malley, 42 Cal. App. 3d 604, 116 Cal. Rptr. 919 (1974); Berman v. Rubin, 138 Ga. App. 849, 227 S.E.2d 802 (1976); Keller v. LeBlanc, 368 So. 2d 193 (La. App.), *cert. denied*, 369 So. 2d 457 (La. 1979); American Employers Ins. Co. v. Globe Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954); Spicknall v. Panhandle State Bank, 278 S.W.2d 622 (Tex. Civ. App. 1954).

3. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984). In so holding, the courts have followed the rule, already well established in medical malpractice cases, in which the establishment of the physican-patient relationship is prerequisite to a recovery in negligence. *See* 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 8.02 (1977).

4. Smith, *The Client's Security Fund: "A Debt of Honor Owed by the Profession,"* 44 A.B.A. J. 125 (1958); Comment, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415 (1977); Note, *The Disenchanted Client v. The Dishonest Lawyer: Where Does the Legal Profession Stand?*, 42 NOTRE DAME LAW. 382 (1967); Sterling, *A Clients' Security Fund*, 36 CAL. ST. B.J. 957 (1961); Amster, *Clients' Security Funds: The New Jersey Story*, 62 A.B.A. J. 1610 (1976).

5. *See supra* note 4.

an attorney-client relationship must be established for reimbursement.

Another situation in which the existence of an attorney-client relationship is important arises when an attorney seeks to assert an attorney's lien, for fees allegedly owed, against the property of a purported client. Two requirements have traditionally been necessary for the creation of an attorney's lien: first, the papers or property must have come into the actual possession of the attorney; and second, they must have come into his possession in his role as an attorney.[6] In other words, the property must have come into his possession by virtue of the attorney-client relationship, and the attorney's lien can only be applied to such property.

One of the most difficult areas in which the existence of an attorney-client relationship becomes important, is the case in which a third party attempts to recover against the client based upon some act of the attorney which allegedly binds the client. At the core of this problem are questions of the attorney's authority, both actual and apparent. Typically, before a court can reach the question of authority, it first must examine the attorney-client relationship. In *Miller v. Mueller*,[7] the court pointed to the course of conduct between the attorney and client as determinative of the extent of authority conferred upon an attorney by his client. In analyzing the attorney-client relationship, the court cited the facts that the attorney was a friend of the client, the attorney was paid no fee, the attorney's office was not used to hold conferences, and the attorney had not sent copies of correspondence with the plaintiff to his supposed client. There was no proof of actual authority to enter into a binding contract for the client and, thus, the court concluded that this was not a typical attorney-client relationship.[8] Absent an attorney-client relationship there can be no authority,[9] unless such authority is predicated upon some other relationship than that which normally exists between attorney and client.

Yet another area, in which the existence of the attorney-client relationship is significant, is within the realm of disciplinary proceedings. Just as the existence of the relationship is crucial to establish duty and its subsequent breach in a negligence case, so it is crucial to establish duty and its subsequent breach in a disciplinary proceeding.[10]

The last major instance in which the existence of the attorney-

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6. II F. MECHEM, AGENCY § 2267, at 1841-42 (2d ed. 1914).
7. 28 Md. App. 141, 343 A.2d 922 (1975).
8. *Id.* at 144, 343 A.2d at 926.
9. *See, e.g.*, Nellis v. Massey, 108 Cal. App. 2d 724, 239 P.2d 509 (1952).
10. *See, e.g.*, Virgin Islands Bar Ass'n v. Johnson, 447 F.2d 169 (3d Cir. 1971), in which proceedings were remanded because it was found that the lower court "stu-

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client relationship becomes important concerns the attorney-client privilege. Although the privilege may, in some instances, precede the creation of the attorney-client relationship, courts have relied heavily on the establishment of the relationship to create the privilege.[11] In *United States v. United Shoe Machinery Corp.*,[12] the court denied the use of the attorney-client privilege to suppress communication to or from the patent department of a corporation. Although many of the employees in the department were attorneys, the court focused on the relationship between the corporation and the employees. Finding that employees in the patent department were mainly concerned with business aspects of patents, regardless of their knowledge of the law, the court held that no attorney-client relationship existed and, therefore, no attorney-client privilege was created.[13]

II. CREATION OF THE TRADITIONAL RELATIONSHIP UNDER ORDINARY CIRCUMSTANCES

If the question of whether an attorney-client relationship has been created in a given case is a troublesome one, it is at least partly because different jurisdictions have varying requirements applicable in more or less formal ways. The Maryland Court of Appeals did not exaggerate when it stated, "[w]hat constitutes an attorney-client relationship is a rather elusive concept."[14]

One thing which does seem clear is that lack of compensation is wholly irrelevant to the issue.[15] This is true, not only when the

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diously avoids finding the requisite attorney-client relationship." *Id.* at 174. *See also In re* Anderson, 52 Ill. 2d 202, 287 N.E.2d 682 (1972).

11. *See, e.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943); Gonzales v. Municipal Ct., 67 Cal. App. 3d 111, 136 Cal. Rptr. 475 (1977). *See also* Note, *Nature of the Professional Relationship Required Under Privileged Communication Rule*, 24 IOWA L. REV. 538, 542-47 (1939).

12. 89 F. Supp. 357 (D. Mass. 1950).

13. *Id.* at 361.

14. Folly Farms I, Inc. v. Bar of Md., 282 Md. 659, 670, 387 A.2d 248, 254 (1978).

15. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Dresden v. Willock, 518 F.2d 281 (3d Cir. 1975); Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); Tormo v. Yormark, 398 F. Supp. 1159 (D.N.J. 1975); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969); Farnham v. State Bar, 17 Cal. 3d 605, 552 P.2d 445, 131 Cal. Rptr. 661 (1976); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, 367 So. 2d 633 (Fla. Dist. Ct. App. 1979); Lawrence v. Tschirgi, 244 Iowa 386, 57 N.W.2d 46 (1953); Alexander v. Russo, 1 Kan. App. 2d 546, 571 P.2d 350 (1977); Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App.), *cert. denied*, 253 La. 60, 216 So.2d 307 (1968); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (1974); Township Bd. of Lake Valley Township v. Lewis, 305 Minn. 488, 234 N.W.2d 815 (1975); State *ex rel.* Massman Const. Co. v. Buzard, 346 Mo. 1162, 145 S.W.2d 355 (1940); *In re* Makowski, 73 N.J. 265, 374 A.2d 458 (1977); People v. Arroyave, 63 A.D. 2d 127, 407 N.Y.S.2d 15 (1978); Anderson v. State, 98 Tex. Crim. 449,

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services were intended to be rendered without a fee, but also where a fee was agreed upon but not paid.[16]

An illustrative case is *Adger v. State*,[17] which involved an appeal of a conviction of assault with a deadly weapon, based on the trial court's error in allowing defendant's retained counsel to withdraw from the case and in the court's further failing to grant a motion for a continuance.[18] The attorney never made a formal appearance for the defendant and, in fact, had never assented to representing her.[19] He intended to withhold his representation until his prospective client paid the fee.[20] Five days before the trial, the attorney called the public defender's office and explained that he probably would not be handling the case.[21] The next day two public defenders were appointed to represent the defendant.[22] The Wyoming Supreme Court found an attorney-client relationship had been created between the initially retained attorney and the defendant, even though there was no payment of a fee.[23] Payment was not a requisite condition to the relationship, as the relationship could be implied where the advice and help of a lawyer was sought and received.[24]

Although the client's failure to pay can justify the withdrawal of an attorney from a case, he owes to the client specific and reasonable notice based on the duties flowing from the already established attorney-client relationship.[25] On the other hand, the payment of a fee is generally deemed conclusive of the relationship,[26] unless the fee can be construed as having been paid for a reason other than attorney's services.

Beyond what has been said here about fees, the starting point of analysis in the creation of an attorney-client relationship is the law of contract. In the traditional analysis there must always be a contract of employment,[27] express or implied,[28] except in cases where

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266 S.W. 159 (1924); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951); Adger v. State, 584 P.2d 1056 (Wyo. 1978).

16. Farnham v. State Bar, 17 Cal. 3d 605, 552 P.2d 445, 131 Cal. Rptr. 661 (1976).
17. 584 P.2d 1056 (Wyo. 1978).
18. *Id.* at 1057.
19. *Id.* at 1059-60.
20. *Id.* at 1060.
21. *Id.* at 1058.
22. *Id.*
23. *Id.* at 1060.
24. *Id.*
25. *Id.*
26. Central Cab Co. v. Clarke, 259 Md. 542, 270 A.2d 662 (1970). Also deemed strongly presumptive is a court appearance on behalf of the purported client. *In re* Brindle, 91 Cal. App. 3d 660, 154 Cal. Rptr. 563 (1979).
27. State Bar v. Jones, 291 Ala. 371, 281 So. 2d 267 (1973); American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974); Ewing v. Haas, 132 Va. 215, 111 S.E. 255 (1922).
28. Virgin Islands Bar Ass'n v. Johnson, 447 F.2d 169 (3d Cir. 1971); Connelly v.

the attorney is court appointed. There has recently been authority, however, to suggest that a precontractual obligation can exist even where the attorney refuses the offered retainer.[29]

It has been said that the relationship of attorney and client is essentially a relationship between two contracting parties and that, therefore, the general body of contract law applies.[30] Thus, the "relation does not exist until such contract is made and in agreeing upon its terms the parties deal at arm's length."[31] Among other terms, the contract may state when the attorney-client relationship commences.

A similarly strict view, based on traditional contract law principles, was expressed by the Alabama Supreme Court in a disciplinary proceeding case.[32] Calling the relationship "purely contractual," and stating that it "is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay [for]," the court apparently envisioned no circumstances in which the relationship could be created informally.[33]

Under contract principles it is generally held that there can be no action for breach of a contract by one not in privity of contract.[34] Examination of the attorney-client relationship, by courts relying on contract principles to establish the relationship, is essentially an examination of privity. The harshness of the privity requirement has been mitigated by the third party beneficiary theory allowing a party who was not in privity, but who was intended to benefit from the contract, to bring an action.[35] In courts relying on contract principles to determine the existence of an attorney-client relationship, the third party beneficiary theory offers a method of imposing liability regardless of privity in attorney-client actions. *Heyer v.*

Wolf, Block, Schorr & Solis-Cohen, 463 F. Supp. 914 (E.D. Pa. 1978); American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974); Colonial Press v. Sanders, 264 So. 2d 92 (Fla. Dist. Ct. App. 1972); Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977); Alexander v. Russo, 1 Kan. App. 2d 546, 571 P.2d 350 (1977); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (1974); Prigmore v. Hardware Mut. Ins. Co., 225 S.W.2d 897 (Tex. Civ. App. 1949); Bresette v. Knapp, 121 Vt. 376, 159 A.2d 329 (1960); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951); Keenan v. Scott, 61 S.E. 806 (W. Va. 1908).

29. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980). This case is discussed at length in part III of the text.

30. State Bar v. Jones, 291 Ala. 371, 281 So. 2d 267 (1973).

31. Setzer v. Robinson, 57 Cal. 2d 213, 217, 368 P.2d 124, 126, 18 Cal. Rptr. 524, 526 (1962).

32. State Bar v. Jones, 291 Ala. 371, 281 So. 2d 267 (1973).

33. *Id.* at 377, 281 So. 2d at 273.

34. 1 A. CORBIN, CONTRACTS § 124 (1962).

35. 6 A. CORBIN, CONTRACTS § 1285 (1962).

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Flaig[36] is one example of a situation where a court has held that an attorney had assumed an attorney-client relationship with the client's intended beneficiaries as well as with the client.

Courts seem particularly willing to impose liability, regardless of an attorney-client relationship, in two situations: will-drafting and title examination. Often they cite the balancing test that was first enunciated by the California Supreme Court.[37] The test cites six factors: the extent to which the transaction was intended to affect the plaintiff; the foreseeability of the harm to him; the degree of certainty that plaintiff suffered injury; the closeness of the connection between defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; and the policy of preventing the conduct in the future.[38] In light of these factors, it is easy to see why courts are more willing to hold attorneys liable in actions such as will-drafting where it is almost assured that others will be affected.

The privity requirement has been further eroded with the development of tort actions and contract actions, brought under misrepresentation and express and implied warranty theories. In light of the United States Supreme Court decision permitting attorneys to advertise,[39] and the subsequent relaxation of the American Bar Association prohibitions against advertising,[40] there has been some speculation that an advertising attorney may be opening the door to greater liability.[41] Advertising can create express and implied warranties.[42] Add to that layman reliance on the advertising, and lia-

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36. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). *See infra* notes 68-69 and accompanying text.

37. Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958). This case dealt with a notary public who had negligently prepared a will. The same analysis has been applied to attorneys. *See* Annot., 45 A.L.R.3D 1181 (1972) and Annot., 65 A.L.R.2D 1358 (1958).

38. *Biakanja*, 49 Cal. 2d at 649, 320 P.2d at 19.

39. Bates v. State Bar, 433 U.S. 350 (1977).

40. In 1978, the American Bar Association's policymaking House of Delegates amended the Model Code of Professional Responsibility to authorize legal advertising in the print and radio media, so long as the advertising is not "a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1981).

41. *See, e.g.*, Beck, *Will Advertising Expose Lawyers to Greater Liability?*, THE BRIEF, Nov. 1980, at 4; Mallor, *Implied Warranties for Legal Services—Tomorrow's Issue?*, 6 OHIO N.L. REV. 651 (1979); Steinberg & Rosen, *Lawyer's Advertising and Warranties: Caveat Advocatus*, 64 A.B.A. J. 867 (1978).

42. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Hoenig, *The Influence of Advertising in Products Liability Litigation*, 5 J. PROD. LIAB. 321 (1982); Beck, *Advertising, Specialization and Warranty Liability*, 44 TEX. B. J. 595 (1981).

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bility could result.[43]

However, courts have thus far been hesitant to extend warranty theories to professional services.[44] It seems clear that there would still have to be some affirmative action on the part of both the attorney and the client to create an attorney-client relationship, before liability on this theory would attach. Nevertheless, the rapidly developing field of products liability law may yet overflow to include professional services.

Another exception to the requirement of a contract to establish an attorney-client relationship involves the court appointed attorney. The question of the duty owed by a court appointed attorney to his client has most often arisen in section 1983 civil rights actions.[45] The client claims that the attorney, while acting under color of state law, has violated his civil rights. Although there has been some split of authority in the district courts as to whether a court appointed attorney is acting under color of state law, the Supreme Court in a recent decision rejected this argument.[46] While a section 1983 action will not lie, the Supreme Court did suggest that a client had other remedies, such as an ordinary malpractice claim based on state tort law. In discussing the duty owed by a court appointed attorney, the Court held that, from the moment a court assigns the case to an attorney, the attorney-client relationship is established.[47]

In *Vance v. Robinson*,[48] the district court seemed to point to the employment relationship between the state and the attorney as the starting point of analysis. There, the court held that once the defendant attorney accepted the appointment to the case, "[h]e owed to the criminal defendant . . . the duties of diligence and faithful

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43. In Broyles v. Brown Engineering Co., 275 Ala. 35, 39, 151 So. 2d 767, 771 (1963), the Alabama Supreme Court said, in dictum: "It is possible that an implied warranty of results by an attorney could exist."

44. Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Bria v. St. Joseph's Hosp., 153 Conn. 626, 220 A.2d 29 (1966); Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969). *But see* Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973).

45. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1983).

46. Polk County v. Dodson, 454 U.S. 312 (1981).

47. *Id.* at 318.

48. 292 F. Supp. 786 (W.D.N.C. 1968).

representation required by the canons of professional ethics . . . ."[49] Thus, the appointment itself appears to establish the attorney-client relationship.

Notwithstanding these exceptions, it appears that all discussion must eventually be observed in the light of the fiduciary nature of the relationship. The fiduciary obligations accepted by all jurisdictions include duties to represent the client with undivided loyalty, preserve the client's confidences, and disclose any material matters bearing upon the representation of these obligations.[50] While these obligations typically come into play after the attorney-client relationship is established, they are at the very foundation of the relationship. Furthermore, there is some case law that suggests the obligations may attach with prospective clients even if the attorney rejects the employment.[51] Although it has been said that the breach of a fiduciary obligation results in a tort action separate and distinct from professional negligence,[52] courts often blur these distinctions and impose liability on a negligence theory. The developing concept of expanded privity, resulting in an attorney's liability for negligence to one other than his client, however, has not been expanded to encompass the attorney's fiduciary obligations.[53]

III. NONTRADITIONAL CREATION OF THE ATTORNEY-CLIENT RELATIONSHIP

The traditional methods of creating the attorney-client relationship carefully circumscribe the nature and extent of an attorney's duties. However, the evolution of legal doctrine in recent years has defied satisfactory classification. Probert and Hendricks have perceptively analyzed the trend as an extension of new duties to nonclients,[54] and have even bemoaned it.[55] The import of these authors' writings is that new duties are devolving upon attorneys to non-clients in new, unpredictable and unavoidable ways. One conclusion was that "[t]he courts are now well along in the first stage of

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49. *Id.* at 788.

50. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 121 (2d ed. 1981).

51. *See, e.g.*, Houston Gen. Ins. Co. v. Superior Court, 108 Cal. App. 3d 958, 166 Cal. Rptr. 904 (1980); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); Desbiens v. Ford Motor Co., 81 A.D.2d 707, 439 N.Y.S.2d 452 (App. Div. 1981).

52. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), *cert. denied*, 299 N.C. 329, 265 S.E.2d 394 (1980).

53. *See, e.g.*, Williams v. Burns, 540 F. Supp. 1243 (D. Colo. 1982); Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982); Forecki v. Kohlberg, 237 Wis. 67, 295 N.W. 7 (1940).

54. Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708 (1980).

55. "Lawyers are increasingly vulnerable to malpractice claims by nonclients." Probert & Hendricks, *Lawyer Malpractice and Nonclients*, 55 FLA. B.J. 620 (1981).

establishing lawyers' responsibility beyond their formal clients."[56] Although this may be true in some instances, another interpretation is now possible: that the courts are not so much creating duties to non-clients, as recognizing new informal ways of creating attorney-client relationships.

To understand this phenomenon it is essential to examine carefully the traditional manner in which an attorney-client relationship may evolve. In general, a contract need not be formal[57] nor expressed in writing[58] to be legally valid, and the same is true of the contract that gives rise to the attorney-client relationship. In point of fact, the contract may be created informally by the implication of the actions of the attorney and the purported client.[59]

Problems occur however, when the interaction between the parties is extremely casual in nature. That the parties may be close friends,[60] or related by blood,[61] does not preclude an attorney-client relationship, nor does it necessarily establish such a relationship.[62] When there is an allegation of an attorney-client relationship based on casual interaction or a confidential relationship, the courts will typically scrutinize the transaction much more closely and at times require more than ordinary corroboration.

Nicholson v. Shockey[63] is just such a case. There, the children of a testatrix were suing their brother, an attorney, to determine the status and ownership of funds, allegedly belonging to the testatrix, and which had been deposited in two joint bank accounts with the right of survivorship in both belonging to the brother.[64] The other children claimed that these deposits were made by the brother acting as attorney for, and confidential advisor to, his mother, and that because he had unduly influenced his client, the transactions were invalid.[65] The court, after a close examination of the evidence, found that there was an implied relationship of attorney and client between the son and the mother regardless of the blood relationship and the lack of a fee paid to the son.[66] Such a decision highlights

56. Probert & Hendricks, *supra* note 54, at 728.
57. 1 A. CORBIN, CONTRACTS § 5 (1963).
58. *Id.* at § 18.
59. *See* Lau v. Valu-Bilt Homes, Ltd., 59 Hawaii 283, 582 P.2d 195 (1978); Flanagan v. DeLapp, 533 S.W.2d 592 (Mo. 1976); Rice v. Forestier, 415 S.W.2d 711 (Tex. Civ. App. 1967). But for a contrary and much stricter view, see Keller v. LeBlanc, 368 So. 2d 193 (La. Ct. App.), *cert. denied*, 369 So. 2d 457 (La. 1979).
60. *In re* Sliz, 246 Ga. 797, 273 S.E.2d 177 (1980).
61. *In re* Schneider, 294 S.W. 736 (Mo. Ct. App. 1927); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951).
62. *In re* Estate of Engel, 87 Ill. App. 3d 273, 408 N.E.2d 1134 (1980).
63. 192 Va. 270, 64 S.E.2d 813 (1951).
64. *Id.* at 272-75, 64 S.E.2d at 814-16.
65. *Id.*
66. *Id.* at 274, 64 S.E.2d at 817. The court went on to find that the existence of an

not only the fact that an implied attorney-client relationship may be casually created, but also that the definition of what constitutes a client has gradually expanded. This expansion of the scope of clients is most easily recognized where third parties are to be benefited by the lawyer's services. Lately, there has been some trend toward allowing third parties to successfully bring malpractice lawsuits against attorneys when there was no direct attorney-client relationship.[67]

In *Heyer v. Flaig*,[68] two daughters brought an action against an attorney for negligently failing to fulfill the testamentary directions of his deceased client. The court held the attorney liable on the ground that once he assumed the relationship with the client, he also realistically and, in fact, assumed an attorney-client relationship with the client's intended beneficiaries.[69] It is interesting to note how reluctant the court was to impose liability without first finding the existence of an attorney-client relationship, however at variance that relationship may seem from the traditional analysis.

The *Heyer* decision, coming nine years after the celebrated case of *Lucas v. Hamm*,[70] indicates a rethinking of the *Lucas* position that a duty to non-clients is based on foreseeability. *Heyer* yields the same consequence as *Lucas* but from a very different doctrinal starting point. It takes us to the proposition that duty is based on the attorney-client relationship. It may superficially allay the "floodgate" fears of those concerned with ever-expanding liability.[71] It is not clear, however, that the informal creation of an attorney-client relationship will serve as a limiting factor. At least in the will-drafting context, we have the unusual situation of an attorney

attorney-client relationship was not even necessary in this case, as there was also a fiduciary relationship which gave rise to a presumption of fraud. *Id.* at 275, 64 S.E.2d at 818.

67. R. MALLEN & V. LEVIT, *supra* note 50, § 101.

68. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

69. *Id.*

70. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). *Lucas* is, of course, the archetypical situation calling for going beyond the privity limitation. The court permitted a cause of action on a theory of foreseeability-predicated duty as well as on a third-party beneficiary approach. The court clearly, however, did not find an attorney-client relationship between the parties.

71. In analyzing the implications of the *Lucas* decision for the 1980's, Probert and Hendricks wrote, "There could be apprehension, however, that the precedent could not be suitably confined. The crack in the door would open wide to excessive claims that would unduly burden the legal profession . . . ." Probert & Hendricks, *supra* note 54, at 710. See also RESTATEMENT (SECOND) OF TORTS § 766C comment a (1979), regarding the general apprehension inhibiting a duty of due care to prevent economic harm. This position can be contrasted with the restrictive and foreseeability-predicated decision of the Minnesota Supreme Court in Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981). In *Marker*, the court noted, "the cases extending the attorney's duty . . . are limited to a narrow range of factual situations in which the client's sole purpose in retaining an attorney is to benefit directly some third party." *Id.* at 5.

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assuming an attorney-client relationship with intended beneficiaries who may be unaware of their status and of the relationship they have thereby "entered."

In addition to the third party beneficiary situations, courts have begun to decide suits dealing with the advice rendered casually by legal professionals. It is quite possible, as has so often happened, that the courts will follow the model already established in medical malpractice cases[72] to determine the character of advice casually rendered by a lawyer. By and large, the courts have been extremely reluctant to find a physician-patient relationship based upon casual advice.[73]

However, there are some important differences between the legal and medical professions which might give rise to a different approach on this issue. For one thing, physicians are unlikely to give advice meant to be taken seriously, without first conducting a physical examination to learn the factual data. Attorneys may be just as unlikely to give advice meant to be taken seriously, without knowledge of certain factual background; but the necessary legal facts may be discoverable (at least from the client's perspective), in casual conversation, whereas the necessary medical facts may not be. For another thing, the courts may well hold attorneys to a higher standard of understanding of the legal implications of casually rendered advice. For these reasons, it is, therefore, quite possible that courts may predicate an attorney-client relationship on casually rendered advice. Attorneys would therefore be wise to avoid giving advice at cocktail parties, in building corridors, over the backyard fence, and at civic organization meetings.

The giving of legal advice by an attorney may be sufficient to create an attorney-client relationship, at least when given in traditional surroundings, notwithstanding the lack of a formal contract.[74] Although the relationship "ordinarily" arises from contract, there may be other ways in which the relationship of attorney and client may be created.[75] The Iowa Supreme Court has declared that a relationship of attorney and client may be created when the following three things occur: "(1) a person seeks advice

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72. For a general discussion of the physician-patient relationship, see 1 D. LOUISELL & H. WILLIAMS, *supra* note 3.

73. *See, e.g.*, Buttersworth v. Swint, 53 Ga. App. 602, 186 S.E. 770 (1936). In *Buttersworth*, the plaintiff was an employee of the defendant physician. The defendant listened to her medical complaint and casually suggested that she wear a brace. The court held that no physician-patient relationship existed upon which a malpractice action could be based. The court was unimpressed by the plaintiff's claim that she relied upon the defendant's advice. *Id.* at 605, 186 S.E. at 771-72.

74. This is directly contrary to the strict view followed by some courts. *See supra* notes 31-33 and accompanying text.

75. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977).

or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."[76] The court further states that the third element may be proved by evidence of detrimental reliance, particularly where the attorney, aware of the reliance, "does nothing to negate it."[77]

The issues thus far have all involved the assumption that an attorney had agreed to perform a service or render advice, or at least that the client believed so. An extremely controversial Minnesota case raised questions going far beyond those assumptions, and thus merits considerable attention.

Togstad v. Vesely, Otto, Miller & Keefe,[78] is a legal malpractice case which grew out of an attorney's negligent handling of his client's medical malpractice claim.[79] The patient had suffered a partial paralysis and total loss of speech during treatment while hospitalized for a cerebral aneurysm.[80] His wife consulted the defendant attorney regarding the possibility of a lawsuit for medical malpractice.[81] There was considerable conflict in the testimony as to what occurred in that interview, but it is agreed that the attorney declined the offered retainer, and that this was clearly understood by the client, Mrs. Togstad.[82] Nevertheless, in the subsequent legal malpractice litigation the plaintiffs were successful.[83]

To understand how this occurred, and to comprehend the issues before the court, it is necessary to look closely at the disputed testimony and the two versions of the interview that took place between Mrs. Togstad and the defendant, Jerre Miller. The testimony of both was in agreement on several important points: there was an interview; the problem of what happened to Mr. Togstad and the possibility of a medical malpractice action was discussed; no medical records were reviewed by the defendant, nor were any medical releases asked for or given the defendant; the defendant was not encouraging about the prospects of any medical malpractice recov-

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76. *Id.*

77. *Id.* For other cases which base the relationship upon the giving of advice, perhaps without regard to contractual formalities, see Tormo v. Yormark, 398 F. Supp. 1159 (D.N.J. 1975) and Shoup v. Dowsey, 134 N.J. Eq. 440, 36 A.2d 66 (1944).

78. 291 N.W.2d 686 (Minn. 1980).

79. This is by no means an unusual situation. *See, e.g.*, Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970). It is perhaps commonplace that an unhappy patient (or at least one sufficiently unhappy to sue his physician), may easily become an unhappy client.

80. *Togstad*, 291 N.W.2d at 689.

81. *Id.* at 690.

82. *Id.* at 690-92.

83. *Id.* at 694.

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ery; and, no fee was billed or paid.[84]

However, there were also significant disagreements. The crucial difference was this: Mrs. Togstad claimed she was told that the defendant "did not think we had a legal case," but that he would contact her if he determined otherwise.[85] The parties agreed that he did not contact her later. Miller, on the other hand, claimed to have told Mrs. Togstad "that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."[86] Miller also claimed to have told Mrs. Togstad that: (1) his firm did not have expertise in the area of medical malpractice; (2) the statute of limitations was two years; and, (3) she should consult another attorney.[87] Mrs. Togstad denied having been told any of these things.[88]

The Togstad's lawsuit was based on the theory that Mrs. Togstad sought legal advice and was given it; such advice created an attorney-client relationship and a legal duty; and, a breach resulted therefrom.[89] The key allegation was that the plaintiffs were negligently given bad advice upon which they relied to their detriment.[90] The case thus had elements of tort, contract, promissory estoppel and reliance.[91]

All of those elements are discussed by the court in connection with the threshold question of the existence of the attorney-client relationship, thus providing a complex analysis of the crucial issue of this Article. The court discussed both the contract theory[92] and the tort theory[93] of attorney-client relationships, but decided that choosing between the two was unnecessary. It noted the two analyses were "very similar" and concluded that "under either theory the evidence shows that a lawyer-client relationship is present here."[94]

Thus, we have the curious situation in which an attorney-client relationship is created by an attorney's refusal to accept a case, or at

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84. *Id.* at 690.
85. *Id.*
86. *Id.* at 691.
87. *Id.*
88. *Id.* at 690.
89. *Id.* at 692.
90. *Id.*
91. *Id.*
92. *Id.* at 692-93.
93. *Id.* The contract theory utilized by the trial court is criticized in Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751, 756 (1979), apparently because of, among other things, a lack of consideration. This criticism ignores the contract-based promissory estoppel approach as espoused in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). *See Togstad*, 291 N.W.2d at 693 n.4.
94. *Togstad*, 291 N.W.2d at 693.

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least by circumstances in which he refuses to do so.[95] The *Togstad* court seems to say that an attorney must explain the reason for rejecting a case, or at least explain whether the reason goes to the merits of the case. At the very least, this duty arises when the decision to reject is made after a more or less formal client interview.[96]

An unfortunate potential consequence could occur if practicing attorneys overreact to the *Togstad* decision. It may be that lawyers will be reluctant to tell potential clients that they do not have a valid claim where they clearly do not. The specter of clients, continually told their cases are being rejected (but not on the merits), wandering from one law office to another until the statute of limitations runs, does not present a flattering picture of professional responsibility. However, attorneys should remember that they are held to a standard of negligence in evaluating a claim, and not to a standard of strict liability. In the *Togstad* trial there was expert testimony that the standard of care of a reasonable attorney in a medical malpractice case required, at a minimum, an examination of the records and consultation with a medical expert.[97]

Togstad also seems to say that an attorney who rejects a case without thoroughly investigating the merits is obliged to explore with the rejected client the issue of the statute of limitations. One would hope that this does not entail an obligation to be definitive, as it may be that the attorney rejecting a case because it is outside of his professional competence may not be able to make a definitive

95. In some respects *Togstad* is similar to the classic medical malpractice case, O'Neill v. Montefiore Hosp., 11 A.D.2d 132, 202 N.Y.S.2d 436 (1960). In that case, the plaintiff's deceased went to a hospital seeking assistance for the chest pains he was experiencing. The nurse called a physician who, according to plaintiff, determined over the telephone that no help was urgently needed. The patient shortly thereafter died. The court held that there was enough evidence for a jury to find a doctor-patient relationship had been created by the physician's determination of nonurgency and the advice allegedly given the patient. *Id.* at 135-36, 202 N.Y.S.2d at 440.

96. In *Togstad* there was a formal interview during which the defendant took notes and asked questions. The transaction took forty-five minutes to an hour. *Togtad*, 291 N.W.2d at 690. *Togstad* thus teaches us nothing about the truly casually rendered, "over-the-backyard-fence" type of advice.

97. *Id.* at 691-92. The defendant maintained throughout that he was not experienced in medical malpractice matters and that his firm associated with a Charles Hvass on those cases they did accept. He claimed that he discussed the case with Hvass shortly after the interview with Mrs. Togstad, and that Hvass "thought there was no liability for malpractice in the case." *Id.* at 691.

The Togstads did not sue Hvass. Had they done so, would he also have been held liable? Although Hvass had never met with Mrs. Togstad, his advice to the defendant apparently played a role in defendant's decision not to contact the Togstads further. In Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971), the liability of a law firm which had been associated by plaintiff's attorney without plaintiff's knowledge or consent, was decided affirmatively. Apparently no one raised the question of the existence or nonexistence of an attorney-client relationship between the firm and the plaintiff. It may well be that a "Togstad v. Hvass"-type case is the next step.

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determination. With statutes of limitations complicated by such things as the discovery rule, it may, in a given case, require an extensive investigation into the facts to arrive at a reasonable conclusion as to when the cause of action accrued. As a result, it ought to be sufficient for the rejecting attorney to merely raise the limitations issue and explain the idea generally to the rejected client.

Related to the result in *Togstad* is the question of whether an attorney can limit the scope of his services so as to provide only part of what the client needs and to "reject" the rest. It is clear that this can be accomplished, but courts differ on what it takes to do so, with some courts holding that no legal expectation is created by partial representation.[98] However, the better view is expressed by a Texas court in *Rice v. Forestier.*[99] There, the defendant attorney had been representing the plaintiff in a series of lawsuits pertaining to his unpaid debts.[100] When the client was served with papers in a new suit, he had those papers delivered to his attorney.[101] The attorney allowed a default judgment to be taken.[102] In defending his malpractice case, the attorney argued that there had been no attorney-client relationship for the additional lawsuit. The court disagreed, stating:

> It is our opinion that under this record Rice owed a duty to inform Forestier that Rice was not going to file an answer for Forestier. In view of the fact that Rice was handling other matters for Forestier at this time, Forestier was justifed in leaving the [papers] with Rice or his secretary . . . . Rice certainly had the right to decline to represent Forestier in this matter if he chose to do so. In such event, however, he would have been obligated to inform Forestier of this decision.[103]

It seems reasonable to impose upon an attorney the affirmative obligations of rejecting a case and making such rejection clear to the client, especially where a continuing relationship between the two would lead to a reasonable expectation of representation. Furthermore, where only partial representation is intended by the attorney, the duty to clarify the scope and define the limits of the representation should be imposed upon the attorney.[104]

The Minnesota decisions issued since *Togstad* affirm the fact that

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98. *See, e.g.*, Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977) and Keller v. LeBlanc, 368 So. 2d 193 (La. Ct. App.), *cert. denied*, 369 So. 2d 457 (La. 1979).

99. 415 S.W.2d 711 (Tex. Civ. App. 1967).

100. *Id.* at 713.

101. *Id.*

102. *Id.*

103. *Id.* For a somewhat similar case, see State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985).

104. Such a duty has clearly been implied for accountants. *See, e.g.*, 1136 Tenants' Corp. v. Max Rothenberg & Co., 36 A.D.2d 804, 319 N.Y.S.2d 1007 (1971).

an attorney-client relationship is still a requirement for a legal malpractice action. In *Marker v. Greenberg,*[105] decided by the Minnesota Supreme Court a year after *Togstad*, the court held that the *Togstad* case stands for the general rule that an attorney is liable for professional negligence only to a person with whom the attorney has an attorney-client relationship and not, in the absence of special circumstances such as fraud or improper motive, to anyone else.[106]

The most enlightening post-*Togstad* decision is *Langeland v. Farmers State Bank.*[107] In *Langeland,* the plaintiff-landowners brought suit against the defendant bank's attorney for emotional distress due to failure to redeem a foreclosed farm in a timely manner.[108] The court, relying on *Togstad,* pointed out that it was the bank and not the plaintiffs who had sought and relied upon the attorney's advice, and therefore, no attorney-client relationship existed upon which to predicate a negligence action against the attorney.[109] The court's holding in *Langeland* also elaborates upon the current status of the attorney-client relationship in light of the demise of traditional contract principles of privity. The decision highlights the fact that whether a contractual-express agreement theory is pursued or whether a negligence theory is the basis of a suit, the requirement of an attorney-client privilege will still be imposed.[110]

For those who felt that the 1980's were carrying with them a death knell for the privity requirement in legal malpractice actions, the recent decisions create a refuge. For, as the courts have increasingly recognized claims by individuals outside of the scope of traditional attorney-client agreements, they have nonetheless preserved the necessity of the relationship.

IV. The Extralegal Relationships of Attorneys

As concerns regarding lawyers' duties to non-clients have grown over the last decade, legal commentators have been quick to highlight cases where attorneys have been held accountable outside of the traditional attorney-client relationship.[111] Yet, while it was initially believed that these cases constituted a sporadic, unpredictable expansion of a lawyer's duties,[112] a thorough analysis of recent cases indicates that duties outside of the relationship have taken a very foreseeable course.

105. 313 N.W.2d 4 (Minn. 1981).
106. *Id.* at 6.
107. 319 N.W.2d 26 (Minn. 1982).
108. *Id.* at 29.
109. *Id.* at 30-31.
110. *Id.* at 30.
111. *See, e.g.,* Probert & Hendricks, *supra* note 54.
112. *Id.*

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What at first may have been hastily labeled by courts and commentators as suits by non-clients against attorneys,[113] can now be more carefully characterized as falling into two general classifications: first are disciplinary actions arising out of an attorney's professional duties owed to the public-at-large as enunciated in the code of ethics; and, second are suits actually based on some other legal theory against an individual who is only incidentally an attorney.

In light of the fiduciary nature of an attorney's services and the high ethical standards required by the legal profession, disciplinary penalties may sometimes lie without the establishment of an attorney-client relationship. *In re Makowski*[114] involved an attorney who commingled his client's investment funds with his own.[115] Although he had provided legal services in the past because he was a personal friend of the client, the attorney argued that the commingled funds were not in his possession as an attorney.[116] The court, imposing a six-month suspension on the attorney, concluded that his argument was spurious, because "[t]he fact that the advice in this instance was more of a business than of a legal nature, does not relieve respondent of a duty to adhere to the high ethical standards exacted of a lawyer."[117]

In fact, it is possible for an attorney to be disciplined under those "high ethical standards" even in the total absence of a client,[118] let alone in the absence of an attorney-client relationship. This situation arises most frequently in disciplinary actions brought under Canon 1 of the Model Code of Professional Responsibility.[119] Canon 1 governs the attorney's maintenance of professional integrity and competence.[120] Under this disciplinary rule, attorneys can be disbarred or reprimanded for such actions as income tax fraud or evasion, or commission of a felony.[121] In none of these situations is

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113. *Id.*

114. 73 N.J. 265, 374 A.2d 458 (1977).

115. *Id.* at 267-68, 374 A.2d at 459.

116. *Id.* at 268-69, 374 A.2d at 460.

117. *Id.* at 267, 374 A.2d at 460.

118. Among the provisions of the American Bar Association Code of Professional Responsibility under which an attorney may be disciplined are: DR 1-103(A), imposing a duty to report misconduct by another attorney; DR 8-101, limiting the influence of an attorney who serves as a public official; and DR 8-102, imposing restrictions on attorneys regarding comments made about judicial candidates or officers. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A), DR 8-101, DR 8-102 (1981).

119. Canon 1 of the Code of Professional Responsibility provides that "[a] lawyer should assist in maintaining the integrity and competence of the legal profession." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1981).

120. *Id.*

121. The precise activities for which an attorney may be disciplined are set forth in DR 1-102 which states:

(A) A lawyer shall not:

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a client necessarily involved, but the attorney is nonetheless held to have a duty to the public at large to maintain the integrity and professionalism of the bar.[122]

The important point is that disciplinary actions are considered to be a different type of proceeding than the usual legal malpractice case. Even though the bar may be able to bring a disciplinary action against an attorney in the absence of an attorney-client relationship, private individuals may not maintain such a suit.[123]

There is a vast variety of work performed by attorneys. It is also true that a very large percentage of those who hold law degrees in this country do not practice law at all. Many of those who do practice law are also involved in varying degrees in nonlegal work; and it is sometimes very difficult to distinguish business or consulting services from services of a strictly legal nature. This is especially true in cases in which the person receiving the services is also a client of the attorney's law practice. The need to distinguish the professional relationship from the nonprofessional relationship, and to determine the limits of each, arises in all six contexts discussed previously,[124] and in one additional context: obligations of the attorney's professional liability insurance carrier to defend and indemnify.[125]

The question raised is: when is an attorney acting as an attorney?

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(1) Violate a Disciplinary Rule.
(2) Circumvent a Disciplinary Rule through actions of another.
(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1981).

122. The entire impetus for the creation of the Code of Professional Responsibility has grown out of the concern that we must protect the public from the unscrupulous lawyer. In the United States, Roscoe Pound is perhaps best noted for tracing the history of the American law practice and setting forth the need for a well trained and well disciplined bar. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 135, 144-73 (1953).

123. Rules of conduct for attorneys are monitored and controlled by either bar associations or the state's own high court. The question raised by the Supreme Court's endorsement of the ABA Canons of Ethics were answered in a series of decisions extending from 1909 to 1914. In these cases, the court established that the power to regulate admission, conduct and discipline of attorneys was an inherent power of the judicial branch of government alone. The legislative branch might enact statutes affecting these matters, but such statutes were to be construed as an aid to the judicial power, and not as a limitation upon it. The first in the series of these cases were the *Thatcher* holdings. *In re* Thatcher, 216 U.S. 625 (1909).

124. *See supra* notes 1-13 and accompanying text.

125. Transamerica Ins. Co. v. Keown, 472 F. Supp. 306 (D.N.J. 1979); Smith v. Travelers Indem. Co., 343 F. Supp. 605 (M.D.N.C. 1972); Watkins v. St. Paul Fire & Marine Ins. Co., 376 So. 2d 660 (Ala. 1979). *See generally* Annot. 84 A.L.R.3D 187, 205 (1978).

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The cases in which this issue has been discussed are legion. For example, in *Page v. Penrose*,[126] an attorney was designated "special counsel" in an attempt to save a failing bank.[127] The services performed were not really of a legal character, but were more of a business nature, such as might be performed by a consulting banking executive.[128] The attorney-client relationship was found not to exist, although it is perhaps significant that this was done to permit the attorney to recover fees for his services.[129]

The issue of the professional or nonprofessional relationship frequently has arisen in cases involving real estate transactions, in which the lawyer might be a lessee,[130] or a consultant in the site selection process,[131] or one who assisted overseas clients with the purchase of property.[132] It may also arise in other "consulting" situations, with the courts having to interpret the meaning of that term.[133]

In *Ellenstein v. Herman Body Co.*,[134] the attorney, as assignee of a law firm, brought an action against the corporation to recover the balance payable under a contract between the law firm and the corporation.[135] The corporation argued that the contract was unfair and that the compensation claimed was unreasonable.[136] Pointing to general equitable principles and the fiduciary nature of the attorney-client relationship, the corporation asked the court to examine the contract for overreaching and for breach of fiduciary duties.[137] While the court acknowledged its power to do just that when an attorney-client relationship existed, it refused to do so in this case based on the fact that the law firm had been engaged in labor con-

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126. 147 Md. 225, 127 A. 748 (1925).

127. *Id.* at 226-27, 127 A. at 749.

128. *Id.* at 227-28, 127 A. at 749.

129. *Id.* at 228, 127 A. at 749. The court held that "while his services [were not] of a strictly legal character, nevertheless, it is just that he should have been compensated for the services he gave at the same rate as he would have been had they been strictly legal in character." *Id.*

130. See Smith v. Martin, 154 Md. 462, 140 A. 593 (1928), where it was held that an attorney-lessee was not in professional relationship with his lessor merely by virtue of preparing the lease to which they were both parties.

131. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1979); Day v. Avery, 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977); Dresden v. Willock, 518 F.2d 281 (3d Cir. 1975); Huester v. Clements, 252 Md. 641, 250 A.2d 855 (1969).

132. Avery v. Lee, 117 A.D. 244, 102 N.Y.S. 12 (App. Div. 1907). Here, the court distinguished between an attorney-at-law and an attorney-in-fact, calling the lawyer in this case the latter.

133. *See, e.g.*, Watkins v. St. Paul Fire & Marine Ins. Co., 376 So. 2d 660 (Ala. 1979); Miller v. Metzinger, 91 Cal. App. 3d 31, 154 Cal. Rptr. 22 (1979).

134. 23 N.J. 348, 129 A.2d 268 (1957).

135. *Id.* at 349, 129 A.2d at 269.

136. *Id.* at 350, 129 A.2d at 269.

137. *Id.* at 350-51, 129 A.2d at 269.

sulting work.[138] The court felt that this was inherently nonlegal work even though the attorney's knowledge of the law may have been used. Without an attorney-client relationship, no fiduciary duties attached and the court refused to examine the contract.

In at least one case, the court was called upon to determine what kinds of services are ordinarily performed by attorneys. In *Rouse v. Pollard*,[139] the court was faced with the defalcation of an attorney, the member of a law firm, who had been given a large sum of money for investment by a client who granted him considerable discretion.[140] In finding that no attorney-client relationship existed (thus relieving the firm of liability), the court said of the arrangement regarding the entrusted funds:

> It is possible that attorneys in isolated instances have done this; just as it is possible that a person of any profession or occupation has done so. It has not, however, been done by lawyers, in this jurisdiction at least with such frequency or appropriateness as to become a phase of the practice.[141]

A careful consideration of these "investment cases" reveals little consistency. The courts seem to focus much attention on the *purpose* for which the decision is required. They also seem to use no small amount of result orientation in reaching their decision. One court[142] looked to a statutory definition of the practice of law.[143] After reviewing two statutes, the court concluded that "[i]t is doubtful that the taking of money for the purpose of investment" fits within the statutory definition.[144]

Still, these cases, like the disciplinary action cases, are not actually extending an attorney's duties into unpredictable and unforseeable new arenas. The position of most courts has been that an attorney who is serving in dual roles may in fact be subjecting himself to dual obligations.

Nancy Lee Mines, Inc. v. Harrison[145] provides an example of the problems associated with this area. Harrison served as both legal counsel and general manager for Nancy Lee Mines, Inc., and for a service corporation created for the purpose of keeping the books

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138. *Id.* at 354-56, 129 A.2d at 271-72.
139. 130 N.J. Eq. 204, 21 A.2d 801 (1941).
140. *Id.* at 205-07, 21 A.2d at 802-03.
141. *Id.* at 209, 21 A.2d at 804.
142. Smith v. Travelers Indem. Co., 343 F. Supp. 605 (M.D.N.C. 1972).
143. This may be considered a questionable approach in that these statutes are more oriented toward issues of unauthorized practice of law than toward the issue at bar. Still, the approach does at least provide a methodology for resolving the issue, as contrasted with most courts, which have dealt merely in platitudes.
144. Smith v. Travelers Indem. Co., 343 F. Supp. 605, 609 (M.D.N.C. 1972).
145. 93 Idaho 652, 471 P.2d 39 (1970).

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and records of several mining companies.[146] After the service corporation's and his services were terminated, Harrison, claiming unpaid legal and managerial fees, filed an attorney's lien on the corporate books.[147] The court declared the lien invalid because the corporate books had not come into his possession by virtue of an attorney-client relationship with Nancy Lee Mines, Inc., but only because he was attorney and general manager of the service corporation.[148] A further problem with Harrison's lien was that it failed to differentiate between the sum claimed for managerial services and the sum claimed for legal services.[149] Since an attorney's lien can only be used when an attorney-client relationship exists, and when it is for a claim for unpaid legal services, Harrison's lien could not stand.[150] Other problems of construction in this area may occur when an attorney commences work for the client, which is then completed by another attorney; another source of difficulty is the consequence of the dissolution of a law firm and the attendant assignments of rights.[151]

In *Folly Farms I, Inc. v. Bar of Maryland*,[152] the court faced the question of whether the attorney-client relationship had to be in existence at the time the loss occurred. This case dealt with an attorney, W. Jacobs, who was also acting as a corporate officer.[153] The trustees of the security fund denied reimbursement based on the finding that the claim arose from Jacobs' relationship as an officer of the corporation rather than from an attorney-client relationship.[154] Pointing to the dual purpose of the fund—protecting the public image of the bar and compensating wronged individuals—the court allowed the claim by adopting the New Jersey "but for" standard. "[B]ut for the fact that the dishonest attorney enjoyed an attorney-client relationship with the claimant at the time of *or* prior to the loss, could such a loss have occurred?"[155]

The cases in this area make a great deal of sense from the standpoint that the courts recognize an attorney may take obligations upon himself beyond his professional relationships, just as any other individual might do. The granting of a license to practice law

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146. *Id.*
147. *Id.*
148. *Id.* at 655, 471 P.2d at 42.
149. *Id.*
150. *Id.*
151. Crabb v. Robert R. Anderson Co., 117 Ill. App. 2d 271, 254 N.E.2d 551 (1969).
152. Folly Farms I, Inc. v. Bar of Md., 282 Md. 659, 387 A.2d 248 (1978).
153. *Id.* at 663-64, 387 A.2d at 251.
154. *Id.* at 664, 387 A.2d at 251.
155. *Id.* at 671, 387 A.2d at 259 (emphasis added).

should not shield a corporate officer or a general manager from liability. Different standards should not be erected simply because the individual who has filled this role is an attorney.

Nevertheless, the courts have not yet developed a reliable and consistent test to determine when an attorney should be dealt with as an attorney or as an ordinary citizen only incidentally an attorney. The sensible approach proposed by this Article would be to focus upon why the individual sought the attorney's services. Was it *because* he was an attorney, or was that fact incidental? This test would avoid the necessity of inquiring into what attorneys "normally" do, and would enable the courts to examine the subjective relationship between the parties. There is, of course, the ever present danger of subjective tests applied not only *post factum*, but also after the commencement of litigation. The plaintiff may claim he was seeking legal advice, even if, in reality, he had not been. However, the plaintiff, seeking to hold the defendant as an attorney, would not merely have to assert that he chose the defendant's services because he (defendant) *was* an attorney. The plaintiff would also have to explain *why* this fact played a substantial role in the selection process. Further, it would be wise to require that plaintiff's decision be judged by the "reasonable person" standard. Such a requirement is eminently suited to protect the attorney from frivolous claims.

CONCLUSION

American courts have been anything but consistent in their determination of what is necessary to create an attorney-client relationship. In no small measure, this has been due to the great variety of contexts in which courts have been called on to decide the issue. In some cases, the courts may be aided by looking at doctor-patient and accountant-client relationships. However, the role of the attorney in our society is unique. What has emerged recently is a new methodology.

Gone are the days when the most difficult problems of the attorney-client relationship could be solved by a quick glance at a contracts hornbook. Modern courts are subjecting new cases to intensive factual analyses. In a way, this is bringing these cases, most of which involve professional malpractice issues, into the mainstream of tort law. What remains to be achieved is a clear agreement as to which facts are most important. One certain candidate, paralleling developments in other areas, is the expectation of the client based on how the situation appears to a reasonable person in the client's position.

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The emphasis on factual analysis is a relatively recent trend. It is to be hoped that, with more experience, the courts will evolve a clearer view of the attorney-client relationship and the duties flowing therefrom.