Forming the Attorney-Client Relationship

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In most instances, members of the legal profession are well aware of when they have established a relationship with an individual or a business entity creating an attorney-client bond. Indeed, one could argue that attorneys spend a great deal of their time in cultivating relationships with others with the hope that some day members of that public will either become clients or refer prospective clients to the lawyer. Some members of the profession become too aggressive in their quest, confuse "ambulance chasing" with "rainmaking," and find themselves facing solicitation complaints in violation of 7.3, MRPC. But what of the opposite problem? What are an attorney's obligations to an individual or a business entity with whom they have had contact, but not to the extent they consider an attorney-client relationship to have formed? Where is the line drawn?

A LOOK BACK

For those of us who have been around since 1980, the *Togstad* case can still bring on shudders.Ftn 1 As many of you will recall, Mrs. Togstad consulted a Minnesota attorney with regard to a possible medical malpractice claim. They discussed the matter for less than an hour at the attorney's law office; no fee arrangements were discussed or authorizations requested. At that point, there were 10 months left before the 24-months statute of limitations would render any claim meaningless, at least any claim against medical providers. There was a dispute between the attorney and the client as to what was said at the consultation, but in any case Mrs. Togstad was left with the impression that her case was weak and that the attorney would consult with others to discuss the case, only getting back to her if she had a viable claim. A year later, after not hearing from the attorney, Mrs. Togstad consulted with another attorney only to find that the statute of limitations had run. Eventually the original law firm was held liable for $649,500, the amount the jury found Mrs. Togstad would have received if she had proceeded with her case in a timely manner. The results sent a shock wave through the local bar and it is fair to say that office procedures addressing the duty to prospective clients were tightened-up considerably in the wake of the decision.

MORE RECENT EXAMPLES

While the office interview is one instance where a lawyer may take on a number of obligations to a prospective client, several recent cases, in the context of both professional liability and professional responsibility, have examined when the attorney-client relationship attaches within the litigation context. As a general rule of thumb, an attorney who appears before a tribunal on behalf of a person is presumed to represent that person as a client, although this presumption may be rebutted.Ftn 2

In California, an attorney made an appearance in court "as a courtesy to the attorney of record." When the attorney of record was sued by the client, so was the attorney who had made the court appearance. The California appellate court, refusing to "distinguish between an association for an entire case and an association for the purpose of hearing on a single motion," found an attorney-client relationship

could arise without any direct dealings between the client and the attorney. Consequently, while we all may agree that a single brief appearance on behalf of a client is quite different than "full" representation, the court felt that it was a difference in degree rather than in kind.Ftn 3

In addition to the situation where a lawyer appears on behalf of the attorney of record as a favor, lawyers can also find themselves in trouble when they make a "brief" court appearance for what they consider to be a former client. Recently this office received a complaint regarding a lawyer who had appeared in court to respond to an order to show cause. He did not oppose the motion and told the court he was simply appearing at the request of the individual who was the former president of the now defunct enterprise that he had represented (thus converting his client into "former" status in the lawyer's mind). He objected to the addition of the former president as an additional defendant and otherwise looked out for the former president's interests. Later, the attorney was served discovery, failed to answer the discovery, and the opposing party was awarded $500 in sanctions against him for his failure to respond. He attempted to vacate the judgment on the grounds that he had no duty to answer discovery for the former client. When this argument failed and the court denied the motion to vacate the judgment, he refused to pay the judgment. He was given an admonition by this office for violating 8.4(d) in part since "a lawyer cannot assert, in good faith, that no 'valid' obligation exists once a debt is reduced to judgment and a lawyer's legal challenges have been exhausted."Ftn 4

FORMING THE RELATIONSHIP

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 a 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 . . . .Ftn 5

As the Restatement notes, the focus will often be on the reasonable reliance of the prospective client. So how should an attorney conduct herself with a prospective client to avoid problems?

An attorney should be aware that at the very least, information learned at an initial consultation must be kept in confidence. As the Comment to Rule 1.6, MRPC, notes "the lawyer (must) preserve confidences and secrets of one who has employed or sought to employ the lawyer." Further, as *Togstad* reminds us, in offering an assessment or giving advice, an attorney has an obligation to be competent and thorough. While you may limit the objectives of representation with client consent under 1.2(b), MRPC, the Comment to that provision notes that "the client may not be asked to agree to representation so limited in scope as to violate 1.1" requiring competent representation. Following-up an initial consultation in writing outlining the reasons for turning down a matter; highlighting the statute of limitations as a warning to the client; and reminding the client of the option to seek another opinion within the remaining time available, have become a common response to an initial consultation in the two decades since *Togstad*. Also note that any papers or property you may receive from a prospective client should be treated as a client's papers and property and carefully returned if you decide not to take the case.Ftn 6

As to court appearances, the cases mentioned should serve as a reminder that most courts will conclude that appearing in court on behalf of a client creates a presumption (that will be difficult to rebut) that the attorney has authorization to do so and that consequently an attorney-client relationship, however brief or tenuous, exists.

CONCLUSION

When a lawyer interviews a prospective client, duties of confidentiality and the safekeeping of papers and property attach immediately. The attorney must be careful; presuming that no relationship exists--or that an "informal" attorney-client relationship exists that is somehow distinguishable from a "formal" one--is a mistake and may well lead to trouble. First and foremost, in the absence of written proof to the contrary, it is the client's perception that will carry the day. When there is a disagreement as to the status of the relationship, the focus will be on what the client reasonably believes as a result of the lawyer's statements and/or conduct. If a court appearance takes place, the lawyer should presume that by appearing on behalf of a party, she is announcing to others, including the presiding judge, that an attorney-client relationship exists. While all practicing attorneys want clients, choosing which clients to represent will always be preferable to having clients you don't wish to represent thrust upon you.

NOTES

[1] Togstad v. Vesely, Otto, Miller & Keefe, *291 N.W.2d 686 (Minn. 1980).*

[2] See Restatement (Third) "The Law Governing Lawyers" *§ 25 (ALI, 2000).*

[3] Streit v. Covington & Crowe, *No. E023862 (Cal. App. July 20, 2000).* See also *25* Professional Liability Reporter *304 (September 2000) which notes that a similar result was reached in another recent case in Illinois*.

[4] In re Stanbury, *561 N.W.2d 507, 511 (Minn. 1997).*

[5] See Restatement (Third) "The Law Governing Lawyers" *§ 14 (ALI, 2000).*

[6] See Restatement, ibid*, § 15 (ALI, 2000).*