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Note

# THE ATTORNEY-CLIENT RELATIONSHIP: EXPLORING THE UNINTENDED CONSEQUENCES OF INADVERTENT FORMATION

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## Introduction

### A. An Illustrative Account

Consider the following situation: two people, Charles Jr. and Lana, departed for a boating trip. Two days later the boat is found adrift with the engine still running. [1] However, no one is aboard. [2] A search and rescue is initiated, but the couple is not found. A newspaper reports the story of the missing couple, referring to it as a mystery. [3]

John is an attorney, and eight days after the boat is found he offers his services on a pro bono basis to Charles Sr. and Patricia, the parents of Charles Jr., via a phone call. [4] On that same day, John mails an introductory packet about his services to the parents. [5] In the meantime, the newspaper continues to report about the couple's disappearance. Six days after John initially offered his services, Lana's body is discovered and identified. [6] The newspaper reports that a member of Lana's extended family suggested that the family was not convinced her death was an accident. [7] A few days after this news, the newspaper reports that additional searches have been called off. [8] Following this report, John makes a subsequent offer to Charles Sr. and Patricia to continue providing them with legal services in exchange for the payment of a reduced fee for the work that he had performed up to that point. [9] However, they decline the offer and formally terminate the attorney-client relationship. [10]

***270** After the termination, John is interviewed by national television news programs and various local newspapers as a "neutral expert who is or was privy to the case's details." [11] During the interviews, John expresses views suggesting that Lana's death was not accidental,

and that there may have been foul play by the other individual on the boat (i.e., Charles Jr.) or a third party. [12]

John sees nothing wrong with providing the interviews because there had been a lot of media coverage on the matter before he became involved. [13] In his view, he is merely reporting on the facts and evidence as they are generally known and have been commented upon by others involved in the investigation. [14] Moreover, John's belief in the appropriateness of his actions is strengthened by the fact that he does not believe that an attorney-client relationship had been created in his interactions with Charles Sr. and Patricia. [15] Further, John had not revealed any information relating to his interactions with Charles Sr. and Patricia that would be disadvantageous to them. [16]

Unfortunately, Charles Sr. and Patricia do not share John's views. They perceive the interviews, and in particular the assertions of possible foul play by their son, as specific acts of misconduct. As a result, they file a request to investigate John with the state Attorney Grievance Commission. [17] The state Attorney Discipline Board agrees with Charles and Patricia. It finds that an attorney-client relationship had been created between John and Charles and Patricia. [18] The Board finds that because there had been an attorney-client relationship in existence, John violated Rules 1.9(c)(1) and (2) of the Michigan Rules of Professional Conduct by using and revealing information related to his representation of Charles Sr. and Patricia to the disadvantage of his clients. [19]

Ultimately, John's ignorance about the various circumstances around which attorney-client relationships are created resulted in the violation of his professional duties, the institution of disciplinary proceedings against him, and a finding of professional misconduct. Although John may have been the most cautious attorney, his minor misstep (being unaware that an attorney-client relationship had been created) resulted in significant consequences. John's story is true. It is a cautionary tale to attorneys ***271** about the importance of knowing the various situations that can lead to the creation of attorney-client relationships. His story provides a pertinent example of the issue that this Note addresses.

## B. Foreword

Lawyers historically have been held to stringent standards with respect to their clients. The attorney-client relationship consists of many fundamentals, including trust, loyalty, competency and confidentiality. [20] These fundamentals impart substantial duties on the attorney in his dealings with clients. Therefore, the attorney-client relationship is a special one, with the attorney having special legal duties and responsibilities to his clients. [21] These

  

duties and responsibilities are defined in the Michigan ***272** Rules of Professional Conduct ("MRPC").[22] For the most part however, these rules, which define the attorney's duties by regulating his relationship with his clients, fail to provide significant guidance to the attorney in determining when an attorney-client relationship is created. Specifically, the MRPC does not address the question: when does a prospective client become a client? Instead, the introductory section on the scope of the MRPC states that "principles of substantive law external to [the] rules determine whether a client-lawyer relationship exists."[23] The section further states that "whether a client-lawyer relationship exists for any ***273** specific purpose can depend on circumstances and may be a question of fact."[24]

Understanding how attorney-client relationships are created is an important issue because the answer determines the applicability of the large body of substantive and professional rules governing an attorney's ethical duties owed to his client.[25] It is a question that may arise whenever there is any contact, direct or indirect, between an attorney and an individual who needs legal advice or assistance. In civil litigation and disciplinary matters, lawyers often seek to avoid the consequences of the creation of an attorney-client relationship by disclaiming its existence.[26] However, the proactive approach adopted by this Note seeks to determine whether there are ways in which lawyers can better protect themselves from unwittingly engaging in an attorney-client relationship.

Not every interaction between an attorney and an individual results in the creation of an attorney-client relationship. Nonetheless, it is important to recognize that even brief consultations between an attorney and a prospective client can result in the formation of this relationship.[27] That an attorney-client relationship was or was not created is frequently a factor in the resolution of numerous claims against an attorney.[28] Therefore, it is important to understand and explore when an attorney-client relationship comes into existence. Until a lawyer knows exactly when this relationship is created, he cannot truly appreciate his duties and responsibilities under the MRPC.

This Note explores the nuances surrounding the various ways in which an attorney-client relationship may come into existence. This Note hopes to impress legal practitioners in Michigan with the importance of knowing when an attorney-client relationship is created, and the attendant professional duties imposed upon the lawyer. This Note also seeks to provide clarity and a greater understanding of the circumstances around which this relationship can be created. Part I of this Note will explore the ***274** ways in which attorney-client relationships are created because the formation of this relationship activates the lawyer's legal and ethical duties. The Part looks at how Minnesota has developed its substantive law with regard to the implied creation of the attorney-client relationship, in hope that Minnesota's experience will provide clarity in an area that is clearly undeveloped

  

in Michigan law. Part II will describe some of the common problems that can arise when the attorney-client relationship is inadvertently created. This Part also includes a consideration of important ethical duties that can be breached when an attorney-client relationship is formed without the lawyer's awareness. Finally, Part III offers succinct analysis of the ways in which lawyers can be liable to non-clients.

## I. How Attorney-Client Relationships are Created

Lawyers routinely engage in conduct that creates attorney-client relationships. Most frequently an express agreement creates this relationship.[29] However, where someone reasonably relies upon the attorney's services, such a relationship may be created by implied agreement.[30] This Part will address each situation in turn.

### A. Creation of the Attorney-Client Relationship Through Express Agreement

The attorney-client relationship is often described as contractual in nature.[31] Under this traditional view, a contract may be express or implied and the rules of contract law govern in determining whether, in a particular case, a contract for employment has been created.[32] Some courts have strictly adhered to this traditional analysis.[33] In Delta Equipment & Construction Co. v. Royal Indemnity Co.,[34] for example, the court pointed to the inherently contractual nature of the attorney-client relationship.[35] The court stated that the relationship is created "from the mutual agreement and understanding of the parties" and is based upon the "clear and express ***275** agreement of the parties" as to the work that will be undertaken and the compensation that will be paid.[36]

The Delta Equipment court emphasized the necessity of an express agreement between the attorney and the client. Indeed, the presence, or lack thereof, of an express agreement is the starting point of analysis in determining whether an attorney-client relationship exists. The Restatement (Third) of the Law Governing Lawyers indicates that an attorney-client relationship may be created by an express agreement. Section 14 provides that "[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 . . . (a) the lawyer manifests to the person consent to do so."[37]

1. Written Agreements

  

An express agreement to form an attorney-client relationship is generally evidenced in writing [38] "in the form of a fee agreement, engagement letter or another writing that bears the indicia of a contract as to the matters on which the advice was sought." [39] However, the most common manifestation of such an agreement is the retainer. [40] By retaining a lawyer, the client "assumes or undertakes to pay for the legal services that will be rendered." [41] Because of its explicit nature, agreement upon amount and payment of the retainer is significant evidence of the formation of an attorney-client relationship. [42] In some cases it may be deemed conclusive evidence of the relationship. [43] Indeed, several courts suggest that the payment of fees or the payment of a retainer is the most authoritative ***276** evidence of the creation of an attorney-client relationship and the lawyer's authority to act. [44] An illustrative case is Simmerson v. Blanks. [45]

In Simmerson, the seller of real estate brought an action against the attorney for the buyer seeking damages for erroneous filing of the financing statement. [46] The buyer paid the attorney $2,000 as consideration for past services the lawyer had performed for him pursuant to a written employment contract. [47] Subsequent to the payment and the closing of the real estate transaction, the attorney informed the seller that the financing statement, which covered personal property involved in the sale, had been executed and recorded in the seller's favor. [48] However, the attorney filed the financing statement in the wrong county. [49] A Georgia appellate court found that the attorney's promise to the buyer that he would file the financing statement on behalf of the seller was a gratuitous promise because it lacked consideration. [50] The court held that "[t]o tax a lawyer's courtesy or liberality for advice or services, is not to employ him. Generally, the test of employment is the fee." [51]

Less common than the retainer, although growing in use, [52] is the engagement letter. Although an infrequently used method of entering into an attorney-client relationship, the engagement letter allows the attorney to define the nature of the attorney-client relationship, including the terms upon which the lawyer will provide legal services. [53] Ultimately, the engagement letter is a form of an express agreement that memorializes the exchange of promises between the attorney and client to enter into an attorney-client relationship. Indeed, courts have looked to letters exchanged between clients and attorneys to determine whether such letters were engagement letters sufficient to create an attorney-client relationship. [54] Furthermore, courts have also determined the consequences ***277** of a law firm's failure to obtain an engagement letter, in violation of a state rule requiring such letters. [55] The engagement letter, because it is in writing, is not merely an express agreement to create an

  

attorney-client relationship. Instead, the engagement letter is also a confirmation of the new legal relationship that is "more formal and contractual than a conversation." [56]

2. Oral Agreements

Although an express contract to create an attorney-client relationship is typically embodied in formal written agreements such as the retainer agreement and the engagement letter, this is not always the case. Express contracts also include oral agreements to create an attorney-client relationship. [57] In fact, legal representation typically begins with an oral exchange of promises. [58] "The lawyer promises to handle the client's matter competently and the client promises to compensate the lawyer for services rendered." [59] Therefore, similar to an express written agreement, an express oral agreement to form an attorney-client relationship "consist[s] of certainty of terms, mutual consent, some form of consideration, a subject matter concerning legal services, and competent parties." [60] Like any other oral contract, an oral contract to form an attorney-client relationship is enforceable. [61] Thus, once an express oral contract is established, it is evidence of the existence of an attorney-client relationship.

***278 B. Creation of the Attorney-Client Relationship Through Implied Agreement**

Even in the absence of an express agreement, whether oral or written, courts are willing to find the existence of an attorney-client relationship. [62] While some courts strictly adhere to the traditional contract analysis by recognizing the existence of an attorney-client relationship only where it can be shown that the parties entered into an express agreement to create one, [63] the overwhelming majority of courts look beyond formalities and are willing to find existence of an attorney-client relationship where there is no formal agreement to create one. [64] In situations where the courts have held that an attorney-client relationship exists absent an express agreement, courts have typically determined that the creation of such a relationship is implied from the conduct of the parties. [65] Courts that have found the existence of an attorney-client relationship exclusive of an express contract or the payment of fees have, in some jurisdictions, typically relied on a tort theory analysis to resolve the question of whether an attorney-client relationship exists. [66]

***279** The oft-cited formulation of the attorney-client relationship promulgated by the Restatement clearly contemplates the implied creation of an attorney-client relationship. The relevant provision provides that:

> 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
>
> . . . .
>
> (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. [67]

The Restatement test recognizes that an attorney-client relationship, even if not created expressly, may nonetheless be deemed to exist depending on the client's intent and the lawyer's actions or lack thereof. Thus, whether an attorney-client relationship exists by implication is ultimately a factual determination based upon the circumstances presented by a particular case. [68] The courts have also taken an approach similar to that of the Restatement's, holding that:

> An attorney-client relationship may be implied "when (1) a person seeks advice 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. . . ." [69]

This suggests that relevant factors in determining whether an attorney-client relationship exists include: whether the individual consulted with the attorney for legal advice; whether the attorney provided his advice or opinion; and whether there was a perception in the individual's mind that the attorney was his counsel. Each of these factors will be discussed in turn. Ultimately, the factors suggest that an attorney-client relationship can be created by implication solely based on the client's understanding and reliance upon the fact that the relationship was indeed created.

1. Consultation with Attorney for Legal Advice

  

In order for an attorney-client relationship to be established, there must be a consultation between the attorney and the individual seeking ***280** legal advice or assistance.[70] Consultation may occur where the client speaks directly to the attorney, or indirectly where the client communicates with someone that has authority to act for the lawyer undertaking the representation.[71]

However, an initial consultation with a lawyer, by itself, may be sufficient to establish an attorney-client relationship. Whether or not the relationship is created upon initial consultation is determined by the client's intent.[72] For a consultation to result in the formation of an attorney-client relationship, the individual initiating the consultation must have done so "with the intent or purpose of seeking legal advice or assistance from the attorney."[73] The importance of the client's intent to receive legal advice is consistent with the case law. Indeed, in Grace v. Center for Auto Safety,[74] the Sixth Circuit stated that "'[i]n determining whether an attorney-client relationship exists' . . . 'the focus is on the client's subjective belief that he is consulting a lawyer in the lawyer's professional capacity and his intent is to seek professional legal advice.'"[75]

Comment c to the Restatement indicates that the client's intent that the lawyer provide legal services may be explicit, or it may arise from the factual circumstances of each individual case.[76] Even if the client intends to receive other services from the lawyer, so long as there is intent to receive legal services, this may be sufficient to establish the relationship.[77] Where an individual is simply receiving some benefit of the lawyer's service, but is not necessarily seeking the lawyer's advice, an attorney-client relationship is not created.[78] Ultimately, "[a] request for legal advice ***281** standing alone may suffice to manifest the intent to receive legal services"[79] that is necessary to create the attorney-client relationship. In determining whether a client has manifested intent to receive legal services, the focus is on the client's state of mind at the time of the consultation and not on what the lawyer believed.[80]

While some courts hold that an individual's consultation with an attorney with the intention of obtaining legal advice is sufficient to create an attorney-client relationship, others hold that a unilateral act or a unilateral belief is insufficient to establish the existence of this relationship.[81] For example, in Rasmussen v. A.C.T. Environmental Services Inc., the court affirmed summary judgment in favor of the defendant lawyer in a fraud action that arose out of loans that the plaintiff made to a corporation in which the lawyer was a principal.[82] The court held that the "decedent's unilateral belief that [the lawyer] had 'continued' to be her attorney was insufficient to confer the status of client upon her with respect to the subject loans."[83]

  

2. Attorney Provides Advice or Opinion

"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." [84] In some jurisdictions, when the client consults with the attorney for the purpose of obtaining legal advice, in order for the attorney-client relationship to be created, the attorney must respond by providing the requested advice. [85] To establish the attorney-client relationship under these circumstances, the court typically states the requirement in the following manner: "[i]t is ***282** sufficient for such a relationship that the advice or the assistance of an attorney is sought and is received." [86]

Alternatively, the attorney-client relationship may also be established where the client seeks the advice of the attorney and the attorney promises to provide the requested advice. The attorney may promise to provide the requested advice expressly or he may do so impliedly. [87] In In re Dowdy, [88] a disciplinary proceeding was brought against an attorney for failure to maintain records with respect to the escrow account for a real estate transaction, and for failure to deliver funds from the account. [89] The Georgia Supreme Court noted that "[a]n attorney cannot agree to perform legal services for a person . . . then deny that such person was a client." [90] Thus, a showing that the attorney agreed to consider a case and render the advice sought is sufficient to establish that an implied attorney-client relationship was formed. [91]

That an implied attorney-client relationship can be created upon the lawyer's furnishing of legal advice takes on a more salient meaning in non-traditional surroundings such as cyberspace. In the context of the Internet, an attorney's online comments may be treated as the giving of legal advice, sufficient to create an attorney-client relationship. Specifically, in a situation where a layperson posts an online question soliciting legal advice, the lawyer's furnishing of the requested legal advice may be sufficient to establish an attorney-client relationship. [92] In the online scenario the "exchange between a layperson and a lawyer that contains a request for the provision of legal advice, the lawyer's consent to provide such legal advice, and the actual provision of that advice can constitute legal services, thus creating an attorney-client relationship." [93]

Moreover, it is not clear whether an attorney who provides legal advice on the Internet, for example by responding to questions posted on ***283** online legal bulletin boards, will be able to avoid liability for malpractice by employing a disclaimer stating that the furnishing of the legal advice does not create an attorney-client relationship. [94] "Whether a lawyer

will be able to rely on a disclaimer will hinge on the nature of the request for advice, the conduct of the lawyer in response to the request, and the factual circumstances surrounding the disclaimer." [95] However, it is questionable whether a disclaimer by itself will negate the existence of an attorney-client relationship given the general consensus among courts that an individual's request for legal advice coupled with the lawyer's furnishing, or promise to furnish, the requested legal advice is sufficient to establish an attorney-client relationship. [96] Ultimately, whether a particular disclaimer is sufficient is a factual determination to be made in each case.

3. Individual's Perception of Attorney as His Counsel

Upon seeking a lawyer's advice, an individual's perception of the lawyer as his counsel may be sufficient to establish the existence of an attorney-client relationship. However, in order for an individual's perception of an attorney as his counsel to be sufficient to establish the creation of an attorney-client relationship, the individual must have more than a "mere expectation" that the attorney will represent him. [97] Therefore, in order for the relationship to arise there must be some reasonable basis for the client to believe that the lawyer is his counsel with respect to a particular matter. [98] In People v. Harris, [99] the court had to determine whether an attorney-client relationship existed between a criminal defendant and an attorney, so as to preclude the attorney from testifying to an exculpatory statement made by the defendant. [100] The Michigan Court of Appeals indicated that there must be some evidence from which the court can find that the relationship was impliedly created. [101] This case illustrates that in the absence of evidence of the client's reasonable belief, the court is unlikely to find that an attorney-client relationship existed.

The context in which the advice is given is a factor in determining whether a reasonable belief exists. Thus, a lawyer may answer a general legal question in "a purely social setting" without an attorney-client ***284** relationship being formed. [102] However, if the lawyer answers the same legal question in his office, for instance, this situation is more likely to lend itself to the conclusion that an attorney-client relationship was formed simply because of the more formal setting. [103] In short, in the latter situation an individual's reliance is more reasonable. Furthermore, in determining whether reliance was reasonable, "courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely on them." [104]

Typically, reasonable reliance is established by showing detrimental reliance. [105] In Kurtenbach v. TeKippe, the court indicated that to show detrimental reliance, the party asserting the existence of an attorney-client relationship must prove that he or she reasonably

  

relied on the attorney to provide legal advice; that the attorney was aware of this reliance; and that the attorney did nothing to negate the party's reliance.[106] Comment e to the Restatement is consistent with the Kurtenbach court's articulation of the requirements of detrimental reliance. Comment e suggests that an attorney-client relationship can arise where an individual "reasonably relies" on the lawyer to provide legal services and the lawyer knows or should reasonably know of this reliance, yet fails to notify the client of his lack of consent to undertake the representation.[107] Thus, the party claiming the existence of an implied attorney-client relationship will be more successful in proving his claim if he can demonstrate that his belief that the attorney was his counsel was objectively reasonable given the attorney's conduct.

4. The Minnesota Experience

The seminal case on the inadvertent creation of an attorney-client relationship is the 1980 Minnesota Supreme Court decision Togstad v. Vesely, Otto, Miller & Keefe.[108] The case arose out of a legal malpractice claim brought against an attorney for his negligent handling of the Togstad's medical malpractice case.[109] Mrs. Togstad consulted Miller, an attorney, for legal advice regarding a possible malpractice action against the hospital and the doctor that treated her husband for a cerebral aneurysm.[110] Minnesota had a two-year statute of limitations period for medical malpractice actions and, at the time that Mrs. Togstad consulted with Miller, there were approximately ten months remaining of the two ***285** years.[111] Mrs. Togstad's consultation with Miller lasted approximately forty-five minutes to an hour, and during that time no fee arrangements were discussed and Mrs. Togstad was not billed for the consultation.[112] While there are some points of agreement, the testimony of Mrs. Togstad and Miller conflict on key issues.

Mrs. Togstad testified that she told Miller what happened to her husband at the hospital, including the circumstances that caused her to be suspicious.[113] She further testified that she went to Miller for "legal advice" and during their meeting Miller never indicated to her that neither he nor his firm had any expertise in the medical malpractice area.[114] Instead, Mrs. Togstad testified that Miller told her he did not think that she and her husband had a case, but that he would consult with his partner and if he changed his mind after discussing the matter, he would contact her.[115] Having not heard from Miller, Mrs. Togstad testified that she relied on his advice that she and her husband did not have a case.[116] Because of this reliance, Mrs. Togstad did not consult another attorney until one year after she talked to Miller, at which point her medical malpractice claim was rendered meaningless because the statute of limitations had expired.[117]

  

In contrast to Mrs. Togstad, Miller testified that close to the end of the meeting he informed Mrs. Togstad that he did not believe "she had a case that [his] firm would be interested in undertaking." [118] He also testified that he told Mrs. Miller that this was only his opinion, and that she should consult with another attorney for another opinion and further, that she should do so "promptly." [119] According to Miller, he told Mrs. Togstad that his firm had no expertise in the area of medical malpractice, and that he would consult with an attorney at another firm which his firm associated with on medical malpractice matters. [120] He stated that if the attorney's opinion differed he would notify Mrs. Togstad. [121]

The Togstad's legal malpractice claim against Miller "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." [122] The jury found that an attorney-client relationship had been created between Mrs. Togstad and Miller; that Miller ***286** rendered advice about the merits of the Togstad's claim upon which Mrs. Togstad relied; and that but for Miller's negligence Mrs. Togstad would have been able to successfully pursue her medical malpractice claim. [123] On appeal, to determine whether the evidence supported the jury's finding that Miller was negligent, the Minnesota Supreme Court had to address the question of whether an attorney-client relationship was formed during the meeting between Mrs. Togstad and Miller. [124] Explaining that the issue of whether an attorney-client relationship existed could be resolved under either a contract or tort theory, [125] the court held that a jury could properly find that: Mrs. Togstad sought legal advice which she received when Miller told her that she did not have a case; she relied on the advice in failing to pursue the claim for medical malpractice; and it was foreseeable that Mrs. Togstad would rely upon the negligently provided advice. [126]

The malpractice claim against Miller was discussed in the context of whether or not an attorney-client relationship had been formed between Mrs. Togstad and Miller. The case suggests that courts may find the existence of an attorney-client relationship even where there was no express agreement to enter into one. Furthermore, this attorney-client relationship can arise out of something as brief and cursory as an initial consultation. Ultimately, it is a warning to lawyers to be more careful about how they address prospective clients, and to be aware of those circumstances which could potentially give rise to an implied attorney-client relationship. Indeed, as Professor Lanctot explains, "[a]lthough not universally accepted, Togstad has stood for two decades as a warning to law students and lawyers about the dangers of providing off-the-cuff legal advice." [127] Moreover, Professor Lanctot notes:

Togstad suggests that a request for legal advice about the merits of a particular claim may readily suffice to begin the process of forming an attorney-client relationship. Indeed, the

  

issue of creating obligations in attorneys from initial consultations has become increasingly prominent in recent years, and more courts appear willing to treat a request for legal advice as the beginning of an attorney-client relationship, even if the parties never formally agree upon representation. [128]

The case suggests that during an initial consultation, a lawyer may take on any number of obligations to a layperson upon their request for advice, the least of which is to engage in adequate research before providing legal advice or opinion. Further analysis of Togstad indicates ***287** that among these obligations, the case "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." [129] In a situation like Togstad, one way a lawyer could protect himself is by putting the details of the initial consultation in writing to reduce the probability of being misunderstood. This writing may take the form of a disengagement letter. It should clearly lay out the status of the relationship between the attorney and the prospective client, making clear that the attorney will not take on the representation. The writing should also be clear on any applicable statutes of limitations that may adversely affect the prospective client's claim.

If there was any thought that Togstad was wrongly decided, this notion was quickly put to rest. The Minnesota Supreme Court reaffirmed the principles of Togstad in two cases decided in 1992. [130] In Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, [131] two corporations brought a legal malpractice action against two law firms, alleging that the defendants' failure to preserve the plaintiffs' ability to arbitrate a dispute was negligent and resulted in damage to the plaintiffs. [132] In order to decide whether summary judgment was properly granted, the court addressed the issue of whether an attorney-client relationship existed between the defendants and one of the plaintiffs. [133] The court reaffirmed the principles it established in Togstad, noting that under a tort theory, "an attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." [134] The court further stated that the plaintiffs presented facts that suggested that "under a tort theory, an attorney-client relationship may have been established between" the particular plaintiff and the defendants. [135]

Similarly, In re Disciplinary Action Against Perry [136] reaffirmed Togstad. In that case, disciplinary proceedings were brought against an attorney for the misappropriation of funds from a trust account held in the name of his mother, and for which he was a trustee. [137] Citing to the principles established in Togstad, the Minnesota Supreme Court held that an attorney-client relationship existed between the attorney and his mother ***288** where the

  

attorney provided legal services with respect to her trust agreement and she reasonably relied on his advice. [138]

The decisions of the Minnesota Supreme Court make it clear that even where there is no express contract to form an attorney-client relationship, Minnesota courts are likely to find the existence of an attorney-client relationship sufficient to trigger a lawyer's ethical duties, in particular when the lawyer has provided advice that the client has relied on. The Togstad case is important because it has been very influential in shaping the boundaries of the implied attorney-client relationship. Minnesota's broad approach to the circumstances under which an implied attorney-client relationship can be created is a warning that lawyers need to be more educated about those circumstances. Minnesota does not stand alone. Other jurisdictions have followed Minnesota's lead and have held that attorney-client relationships may impliedly be created. [139] Michigan lawyers must become more aware of those broad circumstances because with cases such as Macomb County, [140] and more recently Grievance Administrator v. Cote, [141] it is clear that Michigan courts and the state disciplinary board are following Minnesota's lead and implying the creation of attorney-client relationships.

## II. Problems that can Arise when the Attorney-Client Relationship is Created Inadvertently

The professional duties that flow from the MRPC, for the most part, attach after the attorney-client relationship has been formed, where the client has requested that the attorney render legal advice and the attorney has agreed to do so. [142] Other professional duties, such as the duty of ***289** confidentiality, may attach before an attorney-client relationship has been formed, or they may attach independently of any relationship. [143] Furthermore, other rights and benefits that the lawyer or the client may be entitled to may not attach unless an attorney-client relationship has been created. Therefore, it is important to know when an attorney-client relationship has been formed because a lawyer operating under the mistaken assumption that no such relationship has been created may be subject to civil and disciplinary liability.

### A. Compensation

The existence of an attorney-client relationship is a crucial factor in determining whether a lawyer is entitled to compensation for his services.

> It is elementary that an attorney is entitled to compensation for the services he renders to his clients. In many jurisdictions, an attorney is also entitled to

  

> reimbursement for reasonable expenses incurred by him in connection with his clients' cases, at least where he has not assumed a special liability therefor. [144]

An attorney's right to receive compensation for legal services is dependent on whether or not an attorney-client relationship has been created "with the party from whom compensation is sought." [145] In the event of a dispute between the attorney and a party to whom the attorney has provided legal services, the attorney must prove that an attorney-client relationship was created with that party before he can be compensated. Very rarely does the court permit an attorney to receive compensation from one with whom the attorney did not have an attorney-client relationship. [146]

In Plunkett & Cooney, P.C. v. Capitol Bancorp Ltd., [147] the Michigan Court of Appeals declared that "[a]n attorney-client relationship must be established by contract before an attorney is entitled to payment for services rendered." [148] Furthermore, in Macomb County, [149] the Michigan ***290** Supreme Court reinforced this longstanding principle by stating that lawyers are entitled to compensation when they render service to their clients. [150] Moreover, the court noted, the existence of the attorney-client relationship, whether express or implied, is essential to an attorney's right to be compensated for services. [151] Therefore, an attorney who can prove the existence of an attorney-client relationship and who has provided legal services that were requested by the client is entitled to reasonable legal fees. [152] Ultimately:

> A contract of some nature, express, or implied in fact, is essential to the right of the attorney to recover for services rendered. The essentials of a contract between an attorney and client as to compensation for legal services, whether oral or written, express or implied, are the same as those of any other contract. [153]

An attorney who is unable to show that an attorney-client relationship was created cannot recover compensation from someone who did not request the attorney's service or authorize the employment of the attorney. Clearly, being aware of the various circumstances under which attorney-client relationships can be created is in the best interest of a lawyer who wishes to avoid disputes regarding compensation.

  

### B. Liability for Malpractice

For the prudent lawyer, knowing when attorney-client relationships are created is important not only for the purpose of resolving disputes regarding compensation for services, but also for the purpose of reducing the scope of his liability for malpractice. Malpractice liability provides compensation to those who have suffered some loss due to the negligence of a lawyer. The standards outlined in the MRPC ensure that lawyers do not depart from the ordinary degree of care that is owed to their clients. Therefore, "[l]iability for professional malpractice may be imposed on an attorney whenever he has failed to possess or exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated." [154] The attorney's liability for malpractice in negligence is predicated on the existence of "an attorney-client relationship giving rise to a duty to the client; an act or omission by the attorney in breach of the duty; injury suffered by the client; and a 'proximate cause' link between attorney's conduct and the client's damages." [155]

***291** A lawyer's failure to render competent professional service to a client may be the result of a mistaken assumption on the part of the attorney that an attorney-client relationship was never created. In most jurisdictions proof of the creation of an attorney-client relationship is required in order for a party to recover for attorney malpractice. [156] In fact, evidence of the creation of an attorney-client relationship is frequently characterized as the "'threshold' requirement for a malpractice action." [157] Where there is sufficient evidence to suggest that an attorney-client relationship exists, a lawyer can be found liable for malpractice if there has been a breach of the duty of care owed to the client. As discussed at other points in this Note, the court may consider a potentially broad range of circumstances in determining whether or not such a relationship exists. [158]

An attorney who lacks an understanding of the circumstances around which an attorney-client relationship may be created unwittingly leaves himself open to malpractice suits. In other words, "[a] lawyer who has not internalized the normal working conditions of the legal profession for the protection and advancement of client interests [should] be strongly motivated to conform to those conditions because of the significantly increased threat of legal malpractice recovery." [159] The process of internalizing the normal working conditions of the legal profession necessarily includes refining one's ability to recognize the different situations which can lead to the creation of attorney-client relationships. Such knowledge will allow the attorney to develop and implement effective systems for reducing his exposure to malpractice. If lawyer ignorance and technical shortcomings, such as inability to recognize or failure to understand the various ways in which attorney-client relationships can be created,

  

are the basis of malpractice claims against lawyers, then lawyers ***292** must seek out the necessary training and education to prevent or remedy these shortcomings. [160]

## C. Professional Discipline

Failure or inability to recognize that an attorney-client relationship has been created may lead to the violation of ethical duties and subsequent disciplinary proceedings, resulting in the imposition of sanctions against the lawyer. [161] While disciplinary proceedings often arise in relation to malpractice suits discussed above, they are not the same. By engaging in misconduct and violating the ethical rules, a lawyer may face formal disciplinary complaints in addition to a malpractice suit. [162] In Grievance Administrator v. Lopatin, [163] the Michigan Supreme Court adopted the American Bar Association ("ABA") Standards for Imposing Lawyer Sanctions. [164] Pursuant to the ABA Standards "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." [165] The purpose of the disciplinary system is not to punish the lawyer, but to protect the public. Thus, disciplinary proceedings fulfill a social function.

While protection of the public may be a strong underlying motivation for lawyer disciplinary proceedings, there are other inherent objectives of lawyer discipline beyond this social one. As Wolfram notes, "[c]ourts discipline lawyers to incapacitate the offending lawyer, to deter that and all other lawyers from repeated violations of professional regulations, and to protect the image of the bar." [166] The court's concern with protecting the image of the bar suggests that "[a] lawyer's inattention to the duty to a client, or lack of diligence in regard to that duty, even if unaccompanied by moral delinquency and not ground for disbarment, may call for censure and ***293** suspension" or other disciplinary action. [167] Indeed, the rules addressing confidentiality and conflicts of interest are some of the most easily violated professional duties. Often times these violations do not arise from moral delinquency on the lawyer's part, but simply from lack of knowledge as to the circumstances that can lead to the formation of an attorney-client relationship.

### 1. Duty to Keep Client Confidences

The duty of confidentiality is the most obvious professional responsibility issue that arises when an attorney-client relationship is created without the lawyer's knowledge. In fact, it could be argued that it is the most highly valued duty because it is triggered when the client consults with the attorney with the intention of obtaining legal advice, irrespective of whether

  

an attorney-client relationship is created between the attorney and the potential client. [168] The importance of the lawyer's duty of confidentiality is further illustrated by the fact that the duty continues after the attorney-client relationship has been terminated. [169]

The scope of the attorney's duties to keep client confidences is encapsulated in MRPC Rule 1.6. Rule 1.6(a) defines a "confidence" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." [170] Further, Rule 1.6(b) prohibits a lawyer from disclosing a confidence or a secret of a client except under limited circumstances provided for in Rule 1.6(c). [171] An attorney cannot comply with his ethical duty of confidentiality if he fails to recognize the existence of an attorney-client relationship. Therefore, given the significance of the duty of confidentiality, a lawyer who inadvertently enters into an attorney-client relationship and subsequently breaches the duty is likely to face disciplinary action.

2. Identification and Avoidance of Conflicts of Interest

A lawyer who fails to recognize that an attorney-client relationship has been created may violate his ethical obligations by inadvertently undertaking representation or engaging in conduct that involves a conflict of interest. Conflicts of interest can emerge in three scenarios: they may be concurrent; [172] they may arise as a result of a conflict between a client's ***294** interests and the lawyer's interests; [173] or they may be successive. [174] Concurrent conflicts "occur[] when a firm, or an attorney, represents a client and then begins to represent a second client whose interests are adverse to those of the first." [175] On the other hand, a conflict between the client's and the lawyer's interests may occur when, for example, the lawyer enters into a business transaction with his client. [176] Finally, a conflict of interest in successive representation occurs when an attorney represents "a future client whose interest is adverse to that of a previous client in a matter that is substantially related to the previous representation." [177]

MRPC's conflict of interest rules prohibit an attorney from undertaking representation that generates a conflict of interest, unless, in certain limited situations, the attorney obtains the consent of all the affected parties. [178] The conflict of interest rules are designed "to protect the reasonable expectations of clients with regard to the loyalty of the client's lawyer and the confidentiality of the work of a present or former lawyer." [179] Therefore, the underlying concerns of conflicts of interest rules are the fiduciary principles of loyalty and confidentiality.

  

In a situation where a lawyer has unwittingly created an attorney-client relationship with a client, a concurrent conflict may arise if the lawyer decides to represent a second client whose interests are directly adverse to the interests of the first client with whom the lawyer has formed an inadvertent attorney-client relationship. Similarly, a conflict of interest may arise where a lawyer enters into a business transaction with a person with whom he has unknowingly formed an attorney-client relationship. Further, a successive conflict may arise where a lawyer inadvertently forms an implied attorney-client relationship with someone who has interests that are materially adverse to the interests of the lawyer's former client. In all three conflict scenarios described above, the lawyer would violate the ethics rules regarding conflicts of interest because his lack of knowledge of the creation of an attorney-client relationship would make him unaware of the need to obtain the required consent from the affected parties to cure the conflict.

In Cote, for example, a grievance complaint was filed against an attorney after the attorney publicly discussed the details relating to his ***295** representation of a former client, despite indications from the former client that he did not want the information publicly disclosed. [180] The lawyer argued that no attorney-client relationship existed and that the details he disclosed were public information. [181] Despite the attorney's claims, the Grievance Administrator found that an implied attorney-client relationship had been created. Because the attorney-client relationship was formed inadvertently, when the attorney engaged in the conduct that led to the disciplinary proceeding against him he did not recognize that he was violating his professional duties. The attorney's failure to understand how attorney-client relationships are formed led to the grievance administrator's finding that the attorney violated Rule 1.9(c)(1), which prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client. Ultimately, in situations of inadvertent attorney-client relationship formation, conflicts of interest arise because of the lawyer's inattention and ignorance of the ways in which such relationships can be created.

The Board's decision in Cote indicates that a lawyer who is unaware of the circumstances that can lead to the creation of an attorney-client relationship may ultimately violate his professional duties and face subsequent disciplinary action. Disciplinary actions, such as disbarment and suspension, deprive a lawyer of the asset of his professional license and have the effect of tarnishing the lawyer's professional and personal reputation. However, ethical violations that arise as a result of lawyer ignorance of the various ways in which attorney-client relationships are formed can be easily remedied within the confines of the law. This Note provides a starting point in the process of educating the student and the practitioner.

  

## III. Liability to Non-Clients

While an attorney's ethical duties are generally activated upon the establishment of an attorney-client relationship, an attorney may owe other duties to one who is not a client. In short, even where an express or implied attorney-client relationship does not exist, a lawyer may still have a fiduciary duty or an implied obligation to a third party. [182] The frequency of situations in which the lawyer may owe duties outside the traditional ***296** attorney-client relationship has grown exponentially in recent years. [183] That a lawyer may owe duties to non-clients is due, in part, to the highly fiduciary nature of the lawyer's services. [184] Indeed, claims by individuals outside the scope of the traditional attorney-client relationship frequently address concerns regarding a lawyer's fiduciary duties to prospective clients and to other third parties.

### A. Duties to Prospective Clients

The fiduciary duties owed to a potential client are different, and for the most part, less than the fiduciary duties owed to a client. [185] For example, "[p]rospective clients are entitled to the same degree of confidentiality as former clients, but not the same degree of loyalty." [186] Nonetheless, there is still recognition under the current legal ethics regime that some of the important duties a lawyer owes to a client, he also owes to a prospective client. This recognition is encapsulated in Rule 1.18 of the 2007 ABA Model Rules of Professional Conduct. [187] The Rule imposes obligations on the lawyer at the pre-employment stage of his interaction with a prospective client. The relevant provision of Rule 1.18 provides as follows:

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. [188]

Rule 1.18 necessarily implies that "[e]very lawyer consulted about a legal matter incurs certain ethics obligations to the person who consulted the lawyer, even if the relationship goes no further. These obligations . . . are separate from the lawyer's duties under agency, contract,

  

and tort law." [189] The key point to note is that under this rule, no matter how brief the consultation, a lawyer has the same duty of confidentiality to a prospective client as he does to an actual client. Further, any information ***297** learned by the lawyer can only be revealed pursuant to Rule 1.9, which addresses conflicts of interest with former clients. [190]

Despite its perceived benefits, Michigan has not adopted Rule 1.18. [191] Although Michigan has not adopted Rule 1.18, practitioners should be aware that the rule closely parallels section 15 of the Restatement with respect to a lawyer's duties to prospective clients. Thus, it would be an error in judgment to assume that because Rule 1.18 has not been adopted in Michigan, lawyers in the state do not owe fiduciary duties to prospective clients. Instead, section 15 of the Restatement provides Michigan courts with an objective standard upon which to evaluate an attorney's duties toward prospective clients. Section 15(1) provides:

> (1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

(a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client. . .;

(b) protect the person's property in the lawyer's custody. . .; and

(c) use reasonable care to the extent the lawyer provides the person legal services. [192]

Comment b to section 15 indicates that the rationale for the imposition of duties on a lawyer with respect to prospective clients is based on the notion that, like clients, prospective clients provide lawyers with confidential information. [193] However, the information disclosed by a prospective client is disclosed over the course of a limited interaction where the parties agree to go no further. Thus, according to comment b, ***298** "prospective clients should receive some but not all of the protection afforded [to] clients." [194] This is analogous to the ABA's approach. [195]

Like Rule 1.18, section 15 outlines the duties of a lawyer to a prospective client and both make clear that those duties only apply where no attorney-client relationship ensues. Further, commentary on Rule 1.18 and section 15 indicates that the duties owed to prospective clients are limited. Although Rule 1.18 has not been explicitly adopted in Michigan, the Restatement's approach to a lawyer's duties to prospective clients provides some guidance

to the Michigan courts, given the uncertain status of prospective clients under Michigan's current rules. [196] Given the similarities between Rule 1.18 and the section 15, the court's interpretation and application for the Restatement provision provides some indication of its application and interpretation of Rule 1.18.

## B. Duties to Third Parties [197]

A lawyer can owe fiduciary obligations to a third party although no attorney-client relationship exists between the lawyer and that third person. Such obligations arise out of a "special legal relationship" that the lawyer has with another, and which ultimately transforms the lawyer's regular professional duties. [198] This type of relationship is referred to as "triangular" in nature, [199] and it suggests that there is a "linkage of legal responsibility between the lawyer's client and a third person along with a linkage of professional responsibility between the lawyer and the client." [200]

### 1. The Corporate Scenario

The responsibility of an entity's lawyer to the entity's individual constituents represents a simple elucidation of this type of relationship. ***299** This type of relationship is demonstrated by the following illustration: Lawyer-->Entity<--Constituent. [201] The arrows in the preceding example indicate the flow of fiduciary duties. Although there is some inconsistency in this area, the case law generally indicates that "courts are beginning to recognize that in some entity cases the nature of the relationship between an entity's lawyer and its individual constituents may be such that the lawyer owes a duty to the constituents." [202]

In Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., [203] for example, Fassihi, a fifty percent shareholder, officer, and director in a medical corporation, brought suit against the corporation's attorney alleging breach of the attorney-client relationship, breach of fiduciary, legal, and ethical duties, fraud, and legal malpractice. [204] In addition to being the corporation's attorney, the attorney was also the attorney for Lopez, the other shareholder. [205] At Lopez's request, the attorney drafted documents that terminated Fassihi's interest in the corporation. [206] However, because involvement in the corporation was a condition of employment at the hospital where both Fassihi and Lopez were employed, upon being ousted from the corporation, Fassihi was also terminated from his employment. [207] Fassihi filed suit against the attorney partially on the theory that by failing to disclose the

  

fact that he was the personal attorney for Lopez, the attorney breached his fiduciary duty to him. [208]

The Michigan Court of Appeals held that there was no attorney-client relationship between Fassihi and the attorney for the corporation. [209] The court found that the general rule that a corporation is an entity separate and distinct from its shareholders leads to the conclusion that the attorney's client is the corporation and not its constituents. [210] The court further held that even though no attorney-client relationship existed, the attorney owed ***300** fiduciary duties to Lopez. [211] Specifically, the court noted that because of their close interaction with shareholders, attorneys stand in confidential relationships with regard to the corporation and its individual shareholders. [212]

In the Lawyer-->Entity<--Constituent triangular relationship scenario, illustrated by Fassihi, the entity is the dependent, and the beneficiary of both the lawyer's and the individual constituent's fiduciary obligations. [213] But as the case demonstrates, even though the entity is the lawyer's client, the lawyer for a corporation can owe fiduciary duties to one or more of the corporation's constituents. This is so even where no attorney-client relationship exists between the lawyer and the individual constituent. As Fassihi reveals, triangular relationships can result in legal malpractice claims against lawyers "when lawyers fail to recognize, intercept, and mitigate legal derelictions by the dominant actors." [214]

2. Known Beneficiaries

A lawyer may be liable for malpractice to a third person who was the intended beneficiary of services performed by the lawyer on behalf of his client. [215] In this category of cases, the party wanting to establish the lawyer's liability must demonstrate "that he or she is an intended beneficiary of the contract between the attorney and client. In order to achieve the status of an intended beneficiary, the third party must establish that the primary purpose of the contract is to benefit the third party." [216]

In Mieras v. DeBona, [217] for example, the decedent's heirs brought an action against the attorney who drafted the decedent's will. [218] The heirs claimed that the attorney negligently drafted the will because he failed to include in the will a provision exercising the power of appointment to ***301** exclude the decedent's disinherited daughter. [219] In a concurring opinion, five justices on the Michigan Supreme Court held that "beneficiaries named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-

  

party beneficiary status." [220] Mieras demonstrates that in Michigan, an intended beneficiary can bring a claim against a lawyer, even if the lawyer did not represent the intended beneficiary. Thus, lawyers must anticipate that they may be sued for malpractice by parties that fall outside the scope of the traditional attorney-client relationship. The result is that lawyers must become conversant and knowledgeable with regard to those circumstances that can lead to the creation of an attorney-client relationship, as well as those circumstances that may make the lawyer liable to non-clients.

## Conclusion

This analysis has demonstrated that very little on the part of the attorney is required to create an attorney-client relationship. Attorney-client relationships can be created under informal circumstances as well as more traditional formal circumstances. Therefore, a lawyer whose awareness is limited to those circumstances in which the relationship is created formally is acting detrimentally to his own interests. Revisiting the earlier illustration of attorney John and clients Charles Sr. and Patricia, John acted against his own best interests because of his implicit assumption that the attorney-client relationship may only be created formally. Ultimately, this assumption resulted in the institution of disciplinary proceedings against John and a finding of misconduct.

The creation of even an inadvertent attorney-client relationship presents greater potential risks for civil liability and disciplinary action than an intentionally created relationship. [221] When the attorney-client relationship is formed inadvertently, the lawyer may unknowingly engage in conduct that violates his professional duties. [222] Therefore, understanding how attorney-client relationships are formed is vital for the lawyer because establishing an attorney-client relationship inadvertently can have significant ramifications. As the opening illustration demonstrates, lawyers, unquestionably, need a more developed understanding of the circumstances that can lead to the creation of an ***302** attorney-client relationship. To facilitate this understanding, this Note has brought to light and identified the complexity of issues surrounding the formation of the attorney-client relationship. It has offered preliminary insights regarding the approaches that Michigan courts and disciplinary administrators may take in finding that an attorney-client relationship has impliedly been created. At a minimum, it is fair to say that courts that have considered this issue have placed the core of their focus on the client's expectations and beliefs.

Footnotes

1 Grievance Adm'r v. Cote (Cote II), No. 07-83-GA, at 2 (Mich. Att'y Discipline Bd. Sept. 18, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

  

2 Id.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id. at 2-3.

8 Id. at 3.

9 Id.

10 Id.

11 Id.

12 Id. at 3-5.

13 Id. at 5.

14 Id.

15 Id.

16 Id.

17 Id. at 9.

18 Grievance Adm'r. v. Cote (Cote I), No. 07-83-GA, at 2 (Mich. Att'y Discipline Bd. Aug. 31, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

19 Cote II, No. 07-83-GA, at 14.

20 See Haskins v. Bell, 129 N.W.2d 390, 391 (Mich. 1964) ("The relation of attorney and client is one of confidence, based upon the ability, honesty, and integrity of the attorney ...."); Kukla v. Perry, 105 N.W.2d 176, 178 (Mich. 1960) ("The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of the highest trust and confidence.").

21 The special nature of the attorney-client relationship is illustrated by attorney-client privilege. The attorney-client privilege is an evidentiary rule that protects against the compelled disclosure of confidential communications made between an attorney and his client during a proceeding. Sarah A. Rana, Note, Restricting the Attorney-Client Privilege: Necessary Limitations or Distorting the Privilege?, 32 Suffolk U. L. Rev. 687, 694 (1999). As an evidentiary rule, the attorney-client privilege can be distinguished from the ethical duty of confidentiality. "[W]hile the attorney-client evidentiary privilege covers only confidential communications between the attorney and the client, the broader ethical duty of confidentiality requires the protection of all client secrets." State Bar of Cal. Comm. on Prof'l Resp. and Conduct, Formal Op. 2007-173 (2007), in 768 Prac. L. Inst. 321, 329 (2007). The attorney-client privilege can only be raised in the context of a judicial proceeding and the decision regarding whether to apply the privilege is made by the judge. Id. In contrast, the ethical duty of confidentiality applies in "non-litigation" contexts. Id. In this regard, the attorney-client privilege is a limited aspect of the broader duty of confidentiality. However, both the attorney-client privilege and the duty of confidentially are essential to the attorney-client relationship.The most common description of the basic scope of the privilege has been articulated by Professor Wigmore:
(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

  

Avidan Y. Cover, Note, A Rule Unfit for all Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment, 87 Cornell L. Rev. 1233, 1238 (2002) (citing 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (McNaughton 1961)). See McCartney v. Att'y Gen., 587 N.W.2d 824, 828 (Mich. Ct. App. 1998) (The attorney-client "privilege attaches only to confidential communications by the client to his attorney, which are made for the purpose of obtaining legal advice.").In Upjohn v. United States, the Court noted that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." 449 U.S. 383, 389 (1981). See Fisher v. United States, 425 U.S. 391, 403 (1976). Thus, the attorney-client privilege serves both a practical purpose as well as a social purpose. Bufkin Alyse King, Commentary, Preserving the Attorney-client Privilege in the Corporate Environment, 53 Ala. L. Rev. 621, 622 (2002).By assuring the client that information he discloses to his attorney will not be revealed without the client's consent, the client is encouraged to disclose all relevant and pertinent information to the attorney. Id. See also Louis Kaplow & Stephen Shavell, Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability, 102 Harv. L. Rev. 565, 609 (1989) (characterizing the modern commentators' view on the desirability of confidentiality as one that focuses on the extent clients would be willing to reveal information to lawyers if they were not assured confidentiality. "If clients would be nearly as willing, the presumed benefits of consultation would be maintained and tribunals would obtain additional unfavorable information from lawyers; if clients would be substantially less willing, the benefits of consultation would be lost and little gained in return."). The practical purpose of the attorney-client privilege is served because the attorney is able to zealously advocate for the client when the client discloses all relevant information. Furthermore, society benefits from the protection of individual privacy. Charles W. Wolfram, Modern Legal Ethics 245 (Student ed. 1986). Society also benefits from the assurance that justice will be properly administered. King, supra note 21, at 621 (citing Upjohn, 449 U.S. at 391).Because the attorney-client privilege prevents disclosure of information that would otherwise be relevant to a legal proceeding, one of the criticisms often levied against the privilege is that it inhibits the search for truth. Rana, supra note 21, at 694; Kaplow & Shavell, supra note 21, at 608-09 ("The only social cost of protecting the confidentiality of the lawyer-client relationship is seen in the tribunal's inability to obtain information the attorney receives--to which the common reply is that, but for the protection of confidentiality, the information would not have reached the attorney and thus would be unavailable to the tribunal in any event."). Given the substantial effects of the attorney-client privilege on the search for truth, courts try to narrow its scope. See Hickman v. Taylor, 329 U.S. 495, 507 (1947) (holding that memoranda, statements and mental impressions of the attorney fall outside the scope of the attorney-client privilege and are not protected from discovery on that basis); Krug v. Ingham County Sheriff's Off., 691 N.W.2d 50, 56 (Mich. Ct. App. 2004) (holding that a memorandum from one non-attorney to another non-attorney within the sheriff's department sent to give instructions regarding a case file was outside the scope of the attorney-client privilege and thus, was subject to complete disclosure upon request); Yates v. Keane, 457 N.W.2d 693, 695 (Mich. Ct. App. 1990) ("The scope of the attorney-client privilege is narrow. It attaches only to confidential communications by the client to his adviser which are made for the purpose of obtaining legal advice.").

22 Mich. Rules of Prof'l Conduct (West. 2007).

23 Id. R. 1.0 cmt.

24 Id.

25 Id. (saying that most of the duties that are reflected in the rules attach after an attorney-client relationship has been created. Specifically, the duties attach "after the client has requested the lawyer to render legal services and the lawyer has agreed to do so."). See Assoc. Wholesale Grocers, Inc. v. Americold Corp., 975 P.2d 231, 235 (Kan. 1999) (holding that an attorney-client relationship must be established before a violation of the ethical rules will be found to exist).

26 Grievance Adm'r v. Cote (Cote I), No. 07-83-GA, at 2 (Mich. Att'y Discipline Bd. Aug. 31, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

27 48 Am. Jur. 2d Proof of Facts § 1 (1987).

28 For example, civil claims and disciplinary claims. See, e.g., Cote I, No. 07-83-GA; Grievance Adm'r v. Cote (Cote II), No. 07-83-GA (Mich. Att'y Discipline Bd. Sept. 18, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review); Macomb County Taxpayers Ass'n v. L'Anse Creuse Pub. Sch., 564 N.W.2d 457, 460 (Mich. 1997).

29 23 Richard A. Lord, Williston on Contracts § 62:2 (4th ed. 2007).

  

30 Macomb County Taxpayers Ass'n, 564 N.W.2d at 462.

31 Lord, supra note 29, § 62:1 (stating that the attorney-client relationship is consensual and that it is governed by the law of contracts); Scott v. Green, 364 N.W.2d 709, 717 (Mich. Ct. App. 1985) (stating that the attorney-client relationship is based in contract); ABA/BNA, Lawyers' Manual on Prof'l Conduct, § 31: 101 (2002) [hereinafter ABA Manual] ("A lawyer-client relationship can be a matter of contract law, agency law, or tort law. It arises when someone asks a lawyer for help and the lawyer expressly or implicitly gives it or agrees to give it.").

32 Ronald I. Friedman, The Creation of the Attorney-Client Relationship: An Emerging View, 22 Cal. W. L. Rev. 209, 213-14 (1986).

33 Id. at 214; Am. Jur. 2d Proof of Facts, supra note 27, § 7.

34 186 So. 2d 454 (La. Ct. App. 1966).

35 Id. at 458.

36 Id. See Bd. of Comm'r of Ala. State Bar v. Jones, 281 So. 2d 267, 273 (Ala. 1973) ("In order to create an attorney-client relationship ... there must be a contract of employment between the attorney and the client, the same as in other cases of contract.").

37 Restatement (Third) of The Law Governing Lawyers § 14(1) (2000) [hereinafter Restatement].

38 George S. Mahaffey, Jr., All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, the Final Frontier in Professional Liability, 35 Ariz. St. L.J. 21, 30 (2003).

39 James S. Bolan, Breaking Up is Hard to Do, 49-1 B. B.J. 16, 16 (2005).

40 See Lord, supra note 29, § 62:2 ("'Retainer' is the act by which a client engages an attorney to perform legal services." It also "denote[s] the fee that the client pays the attorney upon employing the attorney.").

41 Id. See Mich. Rules of Prof'l Conduct, supra note 22, R. 1.5(b)-(c) (the MRPC does not require a fee agreement to be in writing unless it is a contingent fee agreement, in which case it must be in writing. The rule does state that a written fee arrangement is preferred).

42 Lord, supra note 29, § 62:2

43 Friedman, supra note 32, at 213.

44 See Stone v. Bank of Commerce, 174 U.S. 412, 421 (1899) ("The authority of an attorney commences with his retainer."); Young v. Oak Crest Park, Inc., 428 N.Y.S.2d 69, 70 (N.Y. App. Div. 1980) (holding that there is an inference that no attorney-client relationship exists where no retainer was paid or charged, no bill was submitted by the attorney, and no fee of any kind was paid).

45 254 S.E.2d 716 (Ga. Ct. App. 1979).

46 Id. at 717-18.

47 Id. at 717.

48 Id.

49 Id. at 717-18.

50 Id. at 718.

51 Id. (citing Brown v. Matthews, 4 S.E. 13, 15 (Ga. 1887)).

  

52 D. Christopher Wells, Engagement Letters in Transactional Practice: A Reporter's Reflections, 51 Mercer L. Rev. 41, 41 (1998).

53 Id. at 46-49.

54 See In re Network Assocs., Inc., Sec. Litig., 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (holding that forms sent by a law firm to investors who were the clients of another law firm inviting them to participate in a suit were not engagement letters and thus did not come close to establishing an attorney-client relationship).

55 Seth Rubenstein, P.C. v. Ganea, 833 N.Y.S.2d 566, 572 (N.Y. App. Div. 2007) (holding that in a fee dispute, law firm's failure to obtain a written retainer agreement or letter of engagement with a non-matrimonial client, in violation of a state rule requiring such written agreements, did not prevent the firm from recovering in quantum meruit the fair and reasonable value of the services rendered on behalf of client prior to discharge as counsel).

56 Wells, supra note 52, at 52.

57 Id. (stating that traditional attorney-client contracts have been oral and sealed with nothing more than a handshake). Cf. Kevin Mohr, Ethically Speaking: No Good Deed, 48 Orange County L. 10, 10 (Apr. 2006) (stating that California requires lawyers to have a written fee agreement for any matter where the lawyer expects that the expense to the client will exceed $1,000).

58 Wells, supra note 52, at 52.

59 Id.

60 Nathaniel F. Hansford, Commentary, What Amounts to a Contract to Pay Legal Fees? When is a Document a Valid Contract to Pay Legal Fees?, 24 J. Legal Prof. 423, 424 (2000).

61 See Bates v. Chronister, 691 P.2d 865, 871 (Nev. 1984) ("Ordinarily, construction of a provision for compensation of an attorney is governed by the same rules that generally apply to all contracts."); Strom-Johnson Const. Co. v. Riverview Furniture Co., 198 N.W. 714, 718 (Mich. 1924) (stating that oral agreements are as effective as written ones).

62 See Macomb County Taxpayers Ass'n v. L'Anse Creuse Pub. Sch., 564 N.W.2d 457, 462 (Mich. 1997) (finding that an attorney-client relationship existed between the individual plaintiffs and their respective attorneys, even though there was no express agreement between the parties).

63 Freidman, supra note 32, at 214; Am. Jur. 2d Proof of Facts, supra note 27, § 7.

64 See Macomb County Taxpayers Ass'n, 564 N.W.2d at 462 (holding that the creation of the attorney-client relationship is not dependent on a formal contract or the payment of fees); Lister v. State Bar, 800 P.2d 1232, 1237 (Cal. 1990) (holding that the attorney-client relationship can be created even absent a formal contract or the payment of fees); Assoc. Wholesale Grocers v. Americold Corp., 975 P.2d 231, 236 (Kan. 1999) ("'The authority of an attorney begins with his retainer; but the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship.'" (quoting In re Adoption of Irons, 684 P.2d 332, 339 (Kan. 1984))).

65 See Macomb County Taxpayers Ass'n, 564 N.W.2d at 462; Assoc. Wholesale Grocers, 975 P.2d. at 236.

66 Manion v. Nagin, 394 F.3d 1062, 1068 (8th Cir. 2004) (stating that in Minnesota, an attorney-client relationship can be proven through contract or tort theory). See Gramling v. Mem'l Blood Centers, 601 N.W.2d 457, 459 (Minn. Ct. App. 1999). See also John Casey Pipes, Commentary, The Implied Professional Relationship: An Extension of the Attorney's Duties and Obligations, 20 J. Legal Prof. 319, 323-24 (1996) (stating that a client can attempt to prove the existence of an attorney client relationship under a tort theory or a contract theory. "Under the contract theory, the plaintiff can assert either an expressed or implied contract of representation.... As a tort, the attorney-client relationship is found to exist if the alleged client seeks and receives legal advice from the attorney under facts and circumstances in which a reasonable person would rely on the attorney's advice. These two theories can be summarized in the following ways: (1) whether or not the potential client provided the attorney with confidential information while seeking professional assistance; or (2) whether the potential client and the attorney acted and communicated in such a way that a reasonable lay person would believe that the attorney-client relationship was established."); Friedman, supra note 32, at 222 & n.93.

  

67 Restatement, supra note 37, § 14(1).

68 DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983) ("Where reasonable persons could differ as to the existence of an attorney-client relationship, this issue must be resolved by the trier of fact." (citing Kurtenbach v. TeKippe, 260 N.W.2d 53, 57 (Iowa 1977))).

69 Id. (quoting Kurtenbach, 260 N.W.2d at 56).

70 McCabe v. Arcidy, 635 A.2d 446, 449 (N.H. 1993) (consultation between attorney and another individual is the essential foundation of the attorney-client relationship).

71 See Restatement, supra note 37, § 14 cmt. e (stating that a lawyer may explicitly agree to represent the client, or an agent for the lawyer, for example, a secretary or a paralegal with authority to act for the lawyer, can communicate the lawyer's consent to undertaking the representation).

72 See id. § 14 cmt. c; Douglas K. Schnell, Note, Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship, 17 Harv. J.L. & Tech. 533, 540 (2004) ("[M]any courts and the Restatement adopt the approach that it is the intent of the client that primarily controls the activation of the relationship.").

73 Am. Jur. 2d Proof of Facts, supra note 27, § 9. See Heathcoat v. Santa Fe Int'l Corp., 532 F. Supp. 961 (E.D. Ark. 1982) ("The essential element of an attorney-client relationship is the engagement or consultation of a lawyer by a client for the purpose of obtaining legal services or advice." (citing Diversified Indus., Inc., v. Meredith, 572 F.2d. 596, 602 (8th Cir. 1977))).

74 72 F.3d 1236, 1242 (6th Cir. 1996).

75 Id. (quoting Grace v. Center for Auto Safety, 155 F.R.D. 591, 598 (E.D. Mich. 1994), rev'd, 72 F.3d 1236 (6th Cir. 1996)).

76 Restatement, supra note 37, § 14 cmt c.

77 Id.

78 Id. (pointing to a situation in which the lawyer represents a co-party as an example in which an individual may receive benefit from the lawyer's service, but did not seek the lawyer's advice).

79 Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 170 (1999).

80 See Am. Jur. 2d Proof of Facts, supra note 27, § 9; Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1320 n.14 ("The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought." (citing Raymond L. Wise, Legal Ethics 284 (1970))); ABA Manual, supra note 31, § 31:103 (in establishing a attorney-client relationship the "client's consent is generally necessary, the lawyer's is not").

81 See Douglas v. Monroe, 743 N.E.2d 1181, 1185 (Ind. Ct. App. 2001) ("[A] would-be client's unilateral belief cannot create an attorney-client relationship." (quoting Hacker v. Holland, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991))); Rasmussen v. A.C.T. Envtl. Serv. Inc., 739 N.Y.S.2d 220, 221 (N.Y. App. Div. 2002); Scott v. Green, 364 N.W.2d 709, 717 (Mich. Ct. App. 1985) (holding that a unilateral act is not sufficient to create an attorney-client relationship since the relationship is based on contract).

82 Rasmussen, 739 N.Y.S.2d at 221-222.

83 Id. at 222.

84 Friedman, supra note 32, at 220.

85 See Crest Inv. Trust, Inc. v. Comstock, 327 A.2d 891 (Md. Ct. Spec. App. 1974).

86 Id. at 902.

87 See Todd v. State, 931 P.2d 721, 724 (Nev. 1997).

  

88 277 S.E.2d 36 (Ga. 1981).

89 Id. at 37-38.

90 Id. at 39.

91 Todd, 931 P.2d at 725 (attorney impliedly agreed to consider the client's case and render the advice client sought).

92 Lanctot, supra note 79, at 169 ("[T]he online posting of a specific legal question by a layperson manifests the intent to have a lawyer perform legal services--specifically, to provide legal advice. The lawyer can manifest consent to perform legal services in a number of ways. Most simply, he can post a public message or send a private e-mail message to the putative client expressly stating his consent to give the legal advice. The lawyer can also manifest consent by performance--that is, by providing the requested legal advice. Moreover, even if the lawyer does not wish to enter into a professional relationship with the online questioner, furnishing specific legal advice in response to the question, without more, can constitute consent regardless of the lawyer's subjective intent.").

93 Melissa Blades & Sarah Vermylen, Virtual Ethics for a New Age: The Internet and the Ethical Lawyer, 17 Geo. J. Legal Ethics 637, 640 (2003).

94 See Lanctot, supra note 79, at 170 ("[A]n explicit disclaimer may not suffice to shield an online lawyer from potential liability for the legal advice given.").

95 Id. at 193.

96 See generally In re Dowdy, 277 SE.2d 36 (Ga. 1981); Todd, 931 P.2d 721; Crest Inv. Trust, Inc. v. Comstock, 327 A.2d 891 (Md. Ct. Spec. App. 1974).

97 Gramling v. Mem'l Blood Centers, 601 N.W.2d 457, 460 (Minn. Ct. App. 1999).

98 ABA Manual, supra note 31, § 31:103.

99 149 N.W.2d 473 (Mich. Ct. App. 1967).

100 Id. at 474.

101 Id. (holding that the evidence did not establish that an attorney-client relationship existed).

102 Restatement, supra note 37, § 14 cmt c.

103 Schnell, supra note 72, at 543.

104 Restatement, supra note 37, § 14 cmt e.

105 DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983).

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

107 Restatement, supra note 37, § 14 cmt e.

108 291 N.W.2d 686 (Minn. 1980).

109 Id. at 689.

110 Id. at 689-90.

111 Id. at 690.

112 Id.

113 Id.

  

114 Id.

115 Id.

116 Id.

117 Id.

118 Id. at 691.

119 Id.

120 Id.

121 Id.

122 Friedman, supra note 32, at 222.

123 Togstad, 291 N.W.2d at 692.

124 Id.

125 Id. at 693.

126 Id.

127 Lanctot, supra note 79, at 172-73.

128 Id. at 173.

129 Friedman, supra note 32, at 223.

130 Other cases decided by the Minnesota Supreme Court reaffirming Togstad include: Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26 (Minn. 1982); Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444 (Minn. 2002).

131 494 N.W.2d 261 (Minn. 1992).

132 Admiral Merchants, 494 N.W.2d at 264.

133 Id. at 265.

134 Id. at 265-66.

135 Id. at 265.

136 494 N.W.2d 290.

137 Id. at 292.

138 Id. at 294-95.

139 See, e.g., Matter of Petrie, 742 P.2d 796 (Ariz. 1987); Cuyahoga County Bar Ass'n v. Hardiman, 798 N.E.2d 369 (Ohio 2003); Moen v. Thomas, 682 N.W.2d 738 (N.D. 2004).

140 Macomb County Taxpayers Ass'n v. L'Anse Creuse, 564 N.W.2d 457 (Mich. 1997). The Macomb County Taxpayers Association and several of its members individually filed an action against twelve school districts to challenge the right of school districts to participate in tax base sharing. Id. at 458. The school districts and school board members filed a cross-claim against state departments, which intervened as defendants, alleging that the tax base sharing act violated the Michigan Constitution. Id. at 459. In a claim by the individual members of the taxpayers association and the individual school board members for attorneys fees, the court held that the fact that association members and board members "asked for, received, and

  

acted upon legal advice and services provided by their attorneys" demonstrated that an attorney-client relationship existed between the individual plaintiffs and their respective attorneys. Id. at 462. Thus, the individual plaintiffs' attorney fees were to be included in the allowable costs. Id. at 462-63.

141 Grievance Adm'r v. Cote (Cote II), No. 07-83-GA (Mich. Att'y Discipline Bd. Sept. 18, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

142 Mich. Rules of Prof'l Conduct, supra note 22, R. 1.0 cmt. (stating that most of the duties that are reflected in the rules attach only after an attorney-client relationship has been created. Specifically, the duties attach "after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.").

143 See, e.g., Model Rules of Prof'l Conduct R. 1.18 (2007) (discussing an attorney's duties to prospective clients), available at http:// www.abanet.org/cpr/mrpc/rule_1_18.html [hereinafter Model Rules].

144 Id.

145 Am. Jur. 2d Proof of Facts, supra note 27, § 3.

146 Id. (discussing different scenarios where an attorney may be able to recover compensation from one with whom he did not have an attorney-client relationship). Cf. Lord, supra note 29, § 62: 7 (saying compensation may be permitted on a quantum meruit basis. Where a party has acquiesced to services rendered by an attorney there may be an implied promise to pay for the services and "recovery for services rendered may be available in quasi contract under certain circumstances, and will typically take the form of a quantum meruit recovery for the reasonable value of services rendered.").

147 536 N.W.2d 886 (Mich. Ct. App. 1995).

148 Id. at 889.

149 564 N.W.2d 457 (Mich. 1997).

150 Id. at 462.

151 Id.

152 Id.

153 Lord, supra note 29, § 62:7.

154 Am. Jur. 2d Proof of Facts, supra note 27, § 4.

155 Thomas W. Hyland & Christina M. Thompson, Professional Liability, 690 Prac. L. Inst. 191, 198-99 (2003). See also Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone, 563 N.W.2d 693, 698 (Mich. Ct. App. 1997) (stating that the elements of a legal malpractice action in Michigan are "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." (citing Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773, 775 (Mich. 1994))).

156 Am. Jur. 2d Proof of Facts, supra note 27, § 4.

157 Id.

158 See Mich. Rules of Prof'l Conduct, supra note 22, R. 1.0 cmt. ("Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."); See also Grievance Adm'r. v. Cote (Cote I), No. 07-83-GA, at 1-2 (Mich. Att'y Discipline Bd. Aug. 31, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review) ("We agree with the authorities cited in 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188, that: 'the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from the conduct of the parties.'" (quoting Macomb County Taxpayers Ass'n v. L'Anse Creuse Pub. Sch., 564 N.W.2d 457, 462 (Mich. 1997))).

159 Wolfram, supra note 21, at 207. See, e.g., DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

160 Wolfram, supra note 21, at 208 (saying that lawyer ignorance and technical incompetence are easily cured by education or training to restore technical competence but that these shortcomings are not the only, or most important sources motivating clients' legal malpractice claims).

161 See Restatement, supra note 37, § 5(1) ("A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code."). See also Mich. Rules of Prof'l Conduct, supra note 22, R. 1.0(b) ( "Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process.").

162 Mich. Rules of Prof'l Conduct, supra note 22, R. 1.0(b) (violation of the MRPC is not a basis for civil liability. "The rules do not... give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.").

163 612 N.W.2d 120 (Mich. 2000).

164 Id. at 128.

165 ABA, Standards for Imposing Lawyer Sanctions III.A.1.1 (2005) (adopted by the Michigan Supreme Court in Lopatin, 612 N.W.2d at 123 n.1).

166 Wolfram, supra note 21, at 80.

167 Michigan Pleading and Practice § 4:30 (2d ed. 2008).

168 See Model Rules, supra note 143, R. 1.18; Restatement, supra note 37, § 15.

169 Mich. Rules of Prof'l Conduct, supra note 22, R. 1.6 cmt.

170 Id. at R. 1.6(a).

171 Id. at R. 1.6(b)-(c).

172 See id. at R. 1.7 (states the legal ethics rule governing conflicts of interest in concurrent representation).

173 See id. at R. 1.8 (prohibits certain types of transactions between a lawyer and his client which can create a conflict of interest).

174 See id. at R. 1.9 (addresses conflicts of interest in successive representations).

175 R. David Donoghue, Conflicts of Interest: Concurrent Representation, 11 Geo. J. Legal Ethics 319, 320 (1998).

176 See Mich. Rules of Prof'l Conduct, supra note 22, R. 1.8(a).

177 Jay J. Wang, Conflicts of Interest in Successive Representations: Protecting the Rights of Former Clients, 11 Geo. J. Legal Ethics 275, 289 (1998).

178 See, e.g., Mich. Rules of Prof'l Conduct, supra note 22, R. 1.7(a)(2), 1.8(a)(3), 1.9(a).

179 Wolfram, supra note 21, at 313.

180 Grievance Adm'r. v. Cote (Cote I), No. 07-83-GA, at 2-5 (Mich. Att'y Discipline Bd. Aug. 31, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

181 Id. at 5.

182 Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) ("The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.").

  

183 Friedman, supra note 32, at 225 (stating that cases which have resulted in the expansion of a lawyer's duties outside of the attorney-client relationship have taken a foreseeable course, whereas previously such cases were viewed as sporadic and unpredictable).

184 Id. at 226.

185 Fred C. Zacharias, The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?, 49 Wm. & Mary L. Rev. 569, 609 (2007).

186 ABA Manual, supra note 31, § 31:151.

187 Model Rules, supra note 143, R. 1.18. See also Westinghouse, 580 F.2d 1311.

188 Model Rules, supra note 143, R. 1.18(a)-(b).

189 ABA Manual, supra note 31, § 31:151.

190 See generally Mich. Rules of Prof'l Conduct, supra note 22, R. 1.9.

191 See generally Mich. Rules of Prof'l Conduct, supra note 22; Thomas K. Byerley, Lawyer Disqualification After Initial Consultation, 80 Mich. B.J. 70, 70 (2001). But see State Bar of Mich., Informal Op. RI-48 (1990) (stating that a lawyer is precluded from undertaking future representation materially adverse and substantially related to the subject matter of confidential information imparted to the lawyer by a prospective client). See also State Bar of Mich., Informal Op. RI-123 (1992) (stating that if the confidential information was imparted by the client to someone in the lawyer's employ, the lawyer would also be precluded from undertaking future representation that is "materially adverse and substantially related" to the subject matter of the confidential information). These informal opinions suggest that even though Michigan has not adopted Rule 1.8, Michigan is still very protective of prospective clients prospective clients are given essentially the same protections as former clients.

192 Restatement, supra note 37, § 15(1).

193 Id. § 15 cmt. b.

194 Id.

195 See ABA Manual, supra note 31, § 31:151.

196 Byerley, supra note 191, at 71 (stating that until Michigan's rules are amended to include Rule 1.18, Michigan lawyers are "left with the current standard of trying to define whether or not a 'prospective client' meets Michigan's definition of 'client'").

197 This section provides a very cursory discussion of a lawyer's liability to third party non-clients, which is meant to introduce the reader to some of the attendant issues. The Note does not provide a detailed analysis of the issues that surround a lawyer's liability to third parties. For a more comprehensive analysis, see Geoffrey C. Hazard, Jr., The Privity Requirement Reconsidered, 37 S. Tex. L. Rev. 967 (1996); Nancy J. Moore, Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations, 45 S.C. L. Rev. 659 (1994); Scott Peterson, Extending Legal Malpractice Liability to Nonclients--The Washington Supreme Court Considers the Privity Requirement --Bowman v. John Doe Two, 104 Wn. 2d 181, 704 P.2d 140 (1985), 61 Wash. L. Rev. 761 (1986).

198 Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Legal Ethics 15, 15 (1987).

199 Id.

200 Id.

201 See id. at 17 (the author characterizes the illustration as: Lawyer-->Corporation<--Officer and within this basic type of triangular relationship are other examples, including: Lawyer-->Partnership<--General Partner; Lawyer-->Government<--Government Employee; Lawyer-->Union<--Union Officer; Lawyer-->Ward<--Guardian. Another classic example of a

  

triangular relationship is that of Lawyer-->Guardian-->Ward. Within this basic type are other examples: Lawyer-->General Partner-->Partnership; Lawyer-->Government Employee-->Government; Lawyer-->Union Officer-->Union; Lawyer-->Director--> Corporation).

202 Moore, supra note 198, at 673.

203 309 N.W.2d 645 (Mich. Ct. App. 1981).

204 Id. at 646.

205 Id. at 647.

206 Id.

207 Id.

208 Id.

209 Id. at 648.

210 Id.

211 Id. at 649. Cf. Mich. Rules of Prof'l Conduct, supra note 22, R. 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."). Both Rule 4.3 and the Fassihi holding suggest that it is the duty of the lawyer to clarify who the lawyer is representing.

212 Fassihi, 309 N.W.2d at 649.

213 Hazard, supra note 198, at 16.

214 Id. at 41.

215 See Moore, supra note 197, at 703 ("The law regarding the liability of attorneys to third-party 'non-clients' seems hopelessly confused. Most jurisdictions recognize at least some departures from the traditional strict privity requirement; however, there is no agreement regarding either the appropriate doctrinal basis or even the common fact patterns in which courts will find an attorney liable.").

216 Peterson, supra note 197, at 773.

217 550 N.W.2d 202 (Mich. 1996).

218 Id. at 204.

219 Id.

220 Id. at 214-15.

221 See Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980); Grievance Adm'r v. Cote (Cote I), No. 07-83-GA (Mich. Att'y Discipline Bd. Aug. 31, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review); Grievance Adm'r v. Cote (Cote II), No. 07-83-GA (Mich. Att'y Discipline Bd. Sept. 18, 2007 hearing) (unpublished findings, on file with the University of Detroit Mercy Law Review).

222 See Cote II, No. 07-83-GA.

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