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PROFESSIONAL RESPONSIBILITY

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Every lawyer carries within him the debris of a poet.

§ Gustave Flaubert, *Madame Bovary*

Part I

The Attorney-Client Relationship

Chapter 1

Creating an Attorney-Client Relationship

1. Clients & “Quasi-Clients”

Ideally, the formation of an attorney-client relationship involves formalities like an engagement letter, a retainer agreement, and the payment of attorney’s fees. But none of those formalities are necessary. An attorney-client relationship may be formed whenever a person asks an attorney for legal advice and the attorney provides it, so long as a reasonable person could believe that an attorney-client relationship existed.

Rest. (3d) of the Law Governing Lawyers, § 14

A relationship of client and lawyer arises when:

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

When the attorney intends to represent the client, an express I will refer to people an attorney intends to represent as “clients,” and people an attorney does not intend to represent as “quasi-clients.” An attorney has an “express attorney-client relationship” with clients and an “implied attorney-client relationship” with quasi-clients. But express and implied attorney-client relationships impose many of the same duties on an attorney.

2. The Duties of an Attorney

Attorneys owe certain legal duties to their clients and quasi-clients, whether they have an express attorney-client relationship or an implied attorney-client relationship. Those duties are reflected in the Model Rules of Professional Conduct.

Duty of Care

Attorneys have a duty to act with due diligence in pursuit of their client’s interests. Model Rule 1.1.

Duty of Loyalty

Attorneys may not represent any party with an interest adverse to any of their clients, and must refrain from self-dealing. Model Rules 1.7 & 1.8.

Duty of Impartiality

Attorneys must provide their clients with all of the information their clients need in order to make informed decisions. Model Rule 1.4. Attorneys must also “exercise independent professional judgment and render candid advice.” Model Rule 2.1.

Duty of Confidentiality

Attorneys must maintain in confidence all information obtained while representing their clients, and may not use any confidential client information in a way that could harm that client. Model Rule 1.6.

Even if the lawyer does not intend to represent the client, they may still owe these duties based on an implied attorney-client relationship, if the client reasonably believes the lawyer has agreed to provide legal services.

Togstad v. Vesely, Otto, Miller and Keefe

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

This is an appeal by the defendants from a judgment of the Hennepin County District Court involving an action for legal malpractice. The jury found that the defendant attorney Jerre Miller was negligent and that, as a direct result of such negligence, plaintiff John Togstad sustained damages in the amount of \$610,500 and his wife, plaintiff Joan Togstad, in the amount of \$39,000. Defendants (Miller and his law firm) appeal to this court from the denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial. We affirm.

[* * *]

Mrs. Togstad testified that she told Miller “everything that happened at the hospital,” including the nurses’ statements and conduct which had raised a question in her mind. She stated that she “believed” she had told Miller “about the procedure and what was undertaken, what was done, and what happened.” She brought no records with her. Miller took notes and asked questions during the meeting, which lasted 45 minutes to an hour. At its conclusion, according to Mrs. Togstad, Miller said that “he did not think we had a legal case, however, he was going to discuss this with his partner.” She understood that if Miller changed his mind after talking to his partner, he would call her. Mrs. Togstad “gave it” a few days and, since she did not hear from Miller, decided “that they had come to the conclusion that there wasn’t a case.” No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.¹

¹ (n.3 in opinion) This is a sidenote. It replaces a numbered footnote.

This is a margin note. It is used for commenting on the text.

Mrs. Togstad denied that Miller had told her his firm did not have expertise in the medical malpractice field, urged her to see another attorney, or related to her that the statute of limitations for medical malpractice actions was two years. She did not consult another attorney until one year after she talked to Miller. Mrs. Togstad indicated that she did not confer with another attorney earlier because of her reliance on Miller's "legal advice" that they "did not have a case."

On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of her husband." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

Q And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?

A I am not sure how to answer that. It was for legal advice as to what to do.

Q And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?

A Yes.

On re-direct examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that she and her husband did not have a malpractice case."

[* * *]

Based on the foregoing, we hold that the jury's findings are adequately supported by the record. Accordingly we uphold the trial court's denial of defendants' motion for judgment notwithstanding the jury verdict.

Questions

1. What was the basis for the Togstads' claim that Miller's actions formed an attorney-client relationship? How did Miller respond?
2. What could Miller have done differently to avoid creating an attorney-client relationship?

3. Representing an Organization

When an attorney represents an entity, the attorney's client is the entity not the entity's employees. In other words, when an attorney represents a corporation, limited liability company, partnership, or unincorporated association, the attorney's client is the *organization*, not *the employees of the organization*.

Model Rules of Prof. Conduct, Rule 1.13

Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer

shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Questions

1. Why did Clark object to Hogan & Hartson representing Ferranti in its action against him?
2. What should Clark have done differently?

Chapter 2

Other Styles

1. Constitution, U.S. Code, FRCP, and other legal codes

U.S. Const. art. III, § 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

28 U.S.C. § 1331

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Fed. R. Civ. P., Rule 8

General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

N.C. Gen. Stat. § 84-4

Persons other than members of State Bar prohibited from practicing law

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit

any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of this Chapter. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

