

The Implied Attorney-Client Relationship

A Trap for the Unwary

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An implied attorney-client relationship can be created when an individual reasonably believes he or she is represented by a lawyer. This article considers the conflict of interest that may result in this situation.

Many lawyers are unaware that an implied attorney-client relationship can exist in the absence of a formal agreement for representation and payment of a retainer. Even less understood is the fact that once an implied attorney-client relationship exists, the duties described in the Colorado Rules of Professional Conduct (the Rules) govern the representation. One of the duties that may cause an unwary lawyer trouble is the duty to avoid conflicts of interest under Rule 1.7. This article aims to help lawyers identify and avoid such conflicts of interest.

Creating an Attorney-Client Relationship

Rule 1.7 generally describes conflicts of interest in the lawyer-client relationship. It begins with the admonition that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” But what is “representation”? Put another way, how is an attorney-client relationship created? Unfortunately, while the Preamble to the Rules recognizes the importance of this question, it does not answer it, stating instead, “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.”¹

However, the Preamble provides some guidance by clarifying that “[m]ost of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”² This is similar to the oft-cited answer to the question in the *Restatement (Third) of the Law Governing Lawyers*:

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 services³

The Implied Attorney-Client Relationship

The answer above approaches the representation question from the lawyer’s perspective. Clients, however, may not answer the question in the same scholarly fashion. As a result, both courts and ethics committees have recognized and enforced an “implied” attorney-client relationship. This implied relationship is far more nebulous than the formal relationship recognized by scholars. As one commentator noted: “It appears that no comprehensive study of the implied attorney-client relationship exists, probably because the relationship depends very much on what an individual court says it is.”⁴

Seattle lawyer and ethics lecturer Evan L. Loeffler captured the essence of the implied attorney-client relationship when he wrote:

Life would be a lot simpler if there was theme music or a gong that would sound when something momentous occurs. Even if there were such a cue, there would be a lot of variation from case to case on when the attorney-client relationship started. Many attorneys take the position that the attorney-client relationship commences only after the attorney agrees to representation. Others say it only occurs after a client interview takes place, a fee agreement is signed, and a retainer or fee deposit check has cleared the bank. Unfortunately, it’s more complex than that.

The relationship begins when there is a mutual understanding that the client is going to confide in the attorney and the attorney is going to listen. The attorney-client relationship may commence even if there is nothing in writing. The relationship may commence even if no money has changed hands.⁵

As this passage indicates, under the applicable case law and other authorities, whether an implied attorney-client relationship exists is

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evaluated from the perspective of the client, not the lawyer. An implied attorney-client relationship thus has both subjective and objective elements.

The Client’s Subjective Belief

In *People v. Bennett*, the Colorado Supreme Court stated that, in determining whether an attorney-client relationship exists, “[t]he proper test is a subjective one, and an important factor is whether the client believes that the relationship existed.”⁶ Further, once an attorney-client relationship is formed, it gives “rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on.”⁷

Because the test is subjective, and the client’s belief that an attorney-client relationship exists is an important factor, a non-client could assert that she believed an attorney-client relationship existed, even if one did not. Such claims may also arise where there is a dispute concerning the duration of the relationship, for example, when the lawyer believes the relationship has been terminated but the client claims it has not; or when there is a dispute concerning the scope of the relationship, such as where the lawyer believes the representation does not encompass a particular issue, but the client claims it does.⁸

Testing the Client’s Belief

The Tenth Circuit added an important caveat to the *Bennett* test. In an unpublished decision, it noted that while under *Bennett* “the alleged client’s belief is an important factor,” “the alleged client’s subjective belief must be reasonable.”⁹ If no reasonable person in the putative client’s position could believe that he was seeking and obtaining legal advice from the lawyer, no attorney-client relationship exists.¹⁰

Enter Rule 1.7

One way to create an implied attorney-client relationship is through informal communications between lawyers and others. In some cases, this may create a conflict under Rule 1.7. For example:

One illustration of just how such an informal communication can sneak up on a law firm involved a communication from a friend of an associate at the firm. The associate’s friend asked how to force a landlord to return a security deposit. The associate replied with the appropriate citations to the law governing security deposits and the language needed for a legal demand. The associate’s friend then forwarded the email to the landlord. As it turned out, the landlord was the law firm’s largest client. The associate had not followed any of the law firm’s conflict of interest identification and resolution procedures. Undoubtedly, if the associate had done so, the conflict would have been easily identified and avoided. However, the associate didn’t do so, and the consequences were serious.¹¹

An implied attorney-client relationship can also be created where a lawyer is involved with multiple parties. For example, immigration lawyers frequently represent two parties, a petitioner and a beneficiary. In a family case, the petitioner is required to submit an affidavit of support on behalf of the beneficiary.¹² This affidavit creates obligations between the parties, and between the petitioner and the government.

If the petitioner's income is insufficient to meet the obligation, a cosponsor's affidavit is required. This affidavit also creates obligations between the cosponsor and the beneficiary, and between the cosponsor and the government. This situation can easily create conflicts of interest. The unwary lawyer who thought he was only representing the petitioner and the beneficiary may find that an implied attorney-client relationship exists between the lawyer and the cosponsor, and that a conflict now exists.¹³

Pennington v. Fields is an illustrative case, though it involves a different field of law and a different result.¹⁴ In *Pennington*, the majority shareholders of a closely held business forced the buy-out of the minority shareholder, and litigation ensued. Later, the minority shareholder sued the majority shareholders' lawyer and alleged that he committed legal malpractice by failing to advise the minority shareholder to protect his interests against the majority's possible misconduct.

The lawyer moved for summary judgment, alleging that he owed the minority shareholder no fiduciary duty because he never represented him. The trial court granted the motion. The shareholder appealed, but the appellate court affirmed, noting: "An attorney-client relationship is not created with the individual owner simply because the owner discusses matters with the lawyer that are relevant to both the owner's and the entity's interests."¹⁵ The lawyer had been careful to document that he represented only the corporation in corporate legal matters as required by the board of directors.¹⁶

Avoiding the Trap

Without careful documentation, the corporation's lawyer in *Pennington* could have found himself facing both liability and possible disci-

plinary action. *Pennington* illustrates that it is the lawyer's responsibility to avoid conflicts and to make it clear when there is no attorney-client relationship. If there is a reasonable possibility that the client may perceive the creation of an attorney-client relationship, the lawyer should err on the side of caution and communicate in writing with the non-client. This communication should state that (1) the attorney does not represent the non-client (e.g., "Please be advised that I am not your lawyer"); and (2) the non-client should retain separate counsel (e.g., "You should seek and retain your own legal counsel"). Otherwise, a fact finder could conclude that the lawyer knew or reasonably should have known that the identified person

was relying on the lawyer to provide services. The fact finder could then conclude that an implied attorney-client relationship had been formed and the corresponding ethical obligations had been created.

Conclusion

Lawyers should not be misled into thinking that receiving payment or signing an agreement is necessary to create an attorney-client relationship. Lawyers should pay close attention to the possibility of creating an unintended, implied attorney-client relationship. It is good practice to always check for possible conflicts and clearly communicate to the non-client, in writing, that the lawyer does not represent the non-client. CL



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NOTES

1. Colo. RPC Preamble, ¶ 17.

2. *Id.*

3. *Restatement (Third) of the Law Governing Lawyers* § 14 (American Law Institute 2000). See also *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977); *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986). A salient discussion of the "Subjective Belief of Client" is found in 7A C.J.S. Attorney & Client § 253 (Sept. 2019).

4. Schnell, "Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship," 17 *Harv. J.L. & Tech.* 533, 539 (2004) (citing *Folly Farms I, Inc. v. Trs. of the Clients' Sec. Tr. Fund of the Bar of Md.*, 387 A.2d 248, 254 (Md. 1978) ("What constitutes an attorney-client relationship is a rather elusive concept.")).

5. Loeffler, "How To Avoid the Surprise Attorney-Client Relationship," 27 *GPSolo* 18 (July/Aug. 2010).

6. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).

7. *Id.* (quoting *In re Weiner*, 586 P.2d 194, 197 (Ariz. 1978)).

8. See Ellis, "Liability to Non-Clients: How to Mitigate Risk," 46 *Colo. Law.* 18 (Aug./Sept. 2017). See also *People v. C. de Baca*, 862 P.2d 273 (Colo. 1993). In *C. de Baca*, a woman believed she was represented by a lawyer. The lawyer had no file on the client's case and there was no fee agreement. The lawyer asserted that, at the time of their initial meeting, he did not agree to represent the client. The lawyer claimed he told her that he would not handle

her case because he had been unable to locate an accident report and would have difficulty proving her injury. She and her daughter testified, however, that they believed he had agreed to represent her on a contingent fee basis. The lawyer was suspended for 90 days.

9. *Monus v. Colo. Baseball 1993, Inc.*, 103 F.3d 145 at *8 (10th Cir. 1996). See also *Int'l Tele-Marine Corp. v. Malone & Assocs.*, 845 F.Supp. 1427, 1433 (D.Colo. 1994).

10. *Monus*, 103 F.3d 145 at *8.

11. This example is from Klevens and Clair, "Casual Advice Can Be Binding," Dentons US LLP (Mar. 2016), <http://bit.ly/2UA85iG>.

12. For details on family-based immigration, see Simmons, "Immigrating to the United States Based on Family Status," 40 *Colo. Law.* 45 (June 2011).

13. Simmons, "Rule 1.7 of the Rules of Professional Conduct and I-864 Joint Sponsors: Conflicts According to the Perspective That Counts," *Bender's Immigration Bulletin* vol. 21, no. 16 (Lexis Nexis Matthew Bender Aug. 15, 2016).

14. *Pennington v. Fields*, No. 05-17-00321-CV, 2018 Tex. App. LEXIS 6601 (Tex.App. Aug. 21, 2018).

15. *Id.*

16. For a case where the lawyer was not so careful, see *In re Disciplinary Action against Giese*, 662 N.W. 2d 250 (N.D. 2003) (lawyer suspended).