Confidential Communications: When Does the Attorney-Client Relation Arise?

Since an attorney's duty is to preserve the confidences and secrets of a client, he must be able to determine who is a client. Two considerations are pertinent to this determination. First, is a contract essential to the creation of the attorney-client relation? Second, when is an attorney acting in his "professional capacity"?

Regardless of their reasons for inquiring into the existence of an attorney-client relation, courts have generally said that no formal contract is necessary and that the existence of the relation may be inferred from the conduct of the parties. But still the courts have said that the attorney-client relation is contractual and that the

1. ABA, Code of Professional Responsibility, Canon 4 [hereinafter cited as ABA Code].
general rules of contract govern in determining whether it has been created.\footnote{5}

Characterizing the attorney-client relation as contractual is, at best, misleading, particularly when the duty to preserve the confidences and secrets of a client is the occasion for the inquiry. The same courts that have characterized the relation as contractual have also said that its existence is not dependent upon payment of or agreement for payment of a fee.\footnote{6} However, even where an attorney has agreed to represent a client, it may be that no contract has been entered into because the attorney’s promise is unsupported by consideration.

But there is another, more basic reason for questioning the validity of characterizing the attorney-client relation as contractual. There is evidence that, with reference to the duty to preserve the confidences and secrets of a client, the attorney-client relation may arise even where the attorney has consented neither to receive and preserve confidential information nor to provide his services. Regarding the attorney’s consent to maintain confidentiality, it has been argued that

[t]he question is whether at the time the confidence was imparted the person regarded the lawyer as acting in a legal professional relation toward him. The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought.\footnote{7}

Regarding the attorney’s consent to employment, “it does not matter . . . whether, after the encounter with the client, the attorney refused the case or withdrew before taking any overt action.”\footnote{8} If these conclusions are correct, the attorney-client relation may arise in the absence of the crux of all contractual relationships—mutual assent.


\footnote{7}{\textit{Wise}, supra note 2.}

\footnote{8}{\textit{Id.}}}
A North Carolina bar opinion seems to support the proposition that an attorney's consent to maintain confidentiality is not essential to the formation of the confidential relationship. The committee advised a lawyer who had received confidential and possibly incriminating letters from one with whom, in the committee's opinion, an attorney-client relation had not been clearly established that it would be improper for him voluntarily to permit federal authorities to see the letters in his possession. While an attorney who consents to listen to a prospective client's problems may be presumed to have consented to receive and preserve confidences, the same can hardly be said of an attorney who merely receives a letter, is stopped on the street or cornered at a party.

This opinion stands in stark contrast to two Louisiana cases. In *Olympia Roofing Co. v. City of New Orleans*, the court held that an attorney was not liable to a transferee for his client's ultra vires conveyance of land and commented, "A lawyer owes his client great responsibilities and duties and any obligation of such gravity and magnitude may not be involuntarily thrust upon an attorney." In *Delta Equipment & Construction Co. v. Royal Indemnity Co.*, the court emphasized the contractual nature of the relation and held that the "duty of an attorney to represent a litigant does not arise from the mere mailing to the attorney of documents served upon the litigant incident to a lawsuit . . . ." Perhaps this contrast is best explained by observing that the factors considered in determining the existence of the attorney-client relation tend to vary with the reason for the inquiry.

An Ohio decision, *Taylor v. Sheldon*, supports the proposition that a confidential relation may arise even though the attorney does not consent to provide the legal services sought by the prospective client. A question arose regarding the privileged nature of communications between the decedent and an attorney who had been called to his house to draft a will but who had not drafted it. The court, arguing from the necessity of confidentiality for communications made in prospect of employing an attorney, held that such communications are confidential and that "a tentative attorney-client rela-

tionship" exists during the preliminary discussions. Even though the attorney apparently did not consent to employment by the decedent, the privilege and, by implication, the duty of confidentiality obtained.

Even with these kinds of authority, a prospective client's ability to impose a duty of confidentiality without the attorney's consent, either to the duty or to employment, is not unlimited. For example, an attorney who was consulted by a client's wife concerning a divorce was under no duty to keep the conversation from her husband because she had misrepresented her identity to the attorney. The Michigan Bar Association committee stated, "Until there is an acceptance of such employment by the lawyer with full knowledge of the prospective client's true identity, the professional relationship of lawyer-client has not been created." The opinion might well have been different if the creation of the professional relation with the wife would not have resulted in a conflict of interests. In fact, the committee relied heavily on the potential of a contrary ruling for disruption of existing attorney-client relationships.

The evidence is too sparse to permit broad generalizations regarding the role of the attorney's consent in the creation of the confidential attorney-client relation, but it can be said that in some circumstances a confidential relation may be created without the attorney's consent to receive and preserve confidential information.

14. Id. at 895.

Like Taylor v. Sheldon, much of the data found which pertains to disclosure of confidential information relates to the lawyer-client privilege and not directly to the ethical duty to preserve secrets. However, since both require the existence of an attorney-client relation, cases dealing with the privilege are useful in determining when the relation arises for purposes of the ethical duty. See 8 Wigmore, Evidence § 2292 (McNaughton Rev. 1961). But since the privilege is more limited than the ethical duty, there may be situations in which a relation that is not strong enough to qualify for the privilege will be strong enough to justify imposition of the ethical duty. On the other hand, it is safe to say that a relation which will sustain the privilege will always give rise to the ethical duty. See ABA Code, Disciplinary Rule 4-101, Ethical Consideration 4-4.

or to provide the legal services sought.\textsuperscript{18} Consequently, reliance on
the rules governing the creation of contracts to determine whether
the attorney's duty of confidentiality has arisen may often prove
fallacious.

In \textit{Doe v. A Corp.}, the court, contrasting the attorney-client
privilege and the ethical duty to preserve confidences, stated, "The
sole requirement under Canon 4 is that the attorney receive the
communication in his professional capacity . . . ."\textsuperscript{19} In deciding
when an attorney is acting in his professional capacity, two relevant
considerations are the kind of assistance sought by the purported
client and the existence of another, nonprofessional relationship
between the attorney and the purported client.

Courts frequently say that retainer is established when it is
shown that "advice and assistance of the attorney are sought and
received in matters pertinent to his profession."\textsuperscript{20} But what matters
are "pertinent to the legal profession"?

In \textit{Sodikoff v. State Bar of California},\textsuperscript{21} an attorney who was
counsel of record for an estate wrote the residuary beneficiary to
inform him of the quieting of title to land that he was to receive. In
the letter, the attorney advised the beneficiary to sell the land and
proposed to obtain offers from some of the firm's clients. The benefi-
ciary consented to selling the land and requested that the attorney
continue to manage it. The attorney forwarded an offer from a Cali-
fornia corporation without disclosing that he controlled it and that
the property had been appraised at more than twice what the corpo-

\begin{footnotes}
20. E.g., Anderson v. Lundt, 200 Iowa 1265, 206 N.W. 657, 659 (1925); Erick-
60, 216 So. 2d 307 (1968); Crest Investment Trust, Inc. v. Comstock, 23 Md. App.
280, 327 A.2d 891, 902 (1974); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813,
817 (1951).
21. New York County Opinions, No. 139 (1918).
\end{footnotes}
ration offered. The court, in this disciplinary proceeding, said that even if no formal attorney-client relation had been established, a fiduciary relation had been created. One of the factors considered was that managing property and acting as agent for the sale of property were services "often rendered by an attorney for his client." 23

In McDaniel v. Department of Safety & Permits, 24 the question was whether a privileged relationship existed between McDaniel and an attorney who had used his political influence to get McDaniel a job with a public agency but who had refused to accept payment offered by McDaniel. The court held that there was no attorney-client relation because the assistance sought was not pertinent to the legal profession. That the attorney was an attorney was "merely coincidental." 25

In Huester v. Clements, 26 the court held that an attorney who had assisted Clements in finding land on which to locate a sawmill could not testify for Huester concerning the negotiations for the land, since an attorney-client relation existed between the attorney and Clements in regard to the negotiations.

Plaintiff sought, inter alia, in Addison v. Cope, 27 to have defendant declared to hold a certain note as trustee for plaintiff. Defendant, a practicing attorney, had represented plaintiff in a divorce action and had also advised him concerning a debt owed Swift & Co., for which plaintiff subsequently gave the note in question. Defendant later repurchased the note from Swift at 33 1/3 cents on the dollar. In this action, defendant claimed that the consultation regarding the debt was not a professional matter. The court rejected his contention and found that an attorney-client relation existed regarding the note.

The foregoing examples provide no rules for deciding what matters are pertinent to the legal profession, but they do make it clear that matters pertinent to the legal profession are not always "purely legal" in nature. Perhaps a better formulation of the question is whether the advice or assistance sought is within the broad range of services that lawyers typically and properly provide for clients.

In general, the existence of a nonprofessional relation does not

23. Id. at 335.
25. Id. at 292.
27. 210 Mo. App. 569, 243 S.W. 212 (1922).
preclude the creation of the attorney-client relation. For example, in *Ex parte Schneider*, a habeas corpus proceeding which depended in part on the existence of an attorney-client relation between the attorney and his son, the court said that where the necessary elements of the relation are present "the question of blood relationship is unimportant." However, where there is a nonprofessional relation, the court is likely to ask whether the consultation or assistance was attributable to the nonprofessional relation or to the alleged professional relation.

In *Federal Savings & Loan Insurance Corp. v. Fielding*, defendants were former officers, directors, and employees of two related financial institutions. Two attorneys, Webster and Brebbia, who had been partners in the law firm retained by the institutions and who also had become directors of one of the institutions, were participating in the FSLIC's claim against the defendants. Defendants objected, claiming the attorney-client privilege and alleging breaches of confidence and conflicts of interests on the part of Webster and Brebbia. The court held that attorneys retained by a corporation for legal advice respecting corporate affairs are attorneys of the corporation, not of the officers and directors.

The significance of this case lies not so much in its holding as in dicta regarding the effect of the business relationship between Webster and Brebbia and defendants on the existence of an attorney-client relation between them:

[T]he ethical and evidential strictures are brought into play only when a professional confidential relationship in its purest sense has been established. The attorneys selected by a client must, from one point of view, be dealing at arm's length with the client, as independent legal advisors, bearing in mind, of course, the fiduciary nature of the relationship.

The relationship must be one which supports the reason for the ethical and evidentiary sanctions, that is, the public policy promoting full disclosure in the interests of obtaining sound and well-considered legal advice. When the attorney and the client get in bed together as business partners, their relationship is a business relationship, not a professional one, and their confi-

29. *See In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965); *Wigmore, supra* note 15, at § 2303, n.1.
idences are business confidences unprotected by a professional privilege. . . .\textsuperscript{31}

This language must be read in light of a later statement by the court that to the extent that it could be shown that Webster and Brebbia or others associated with their firm received confidential information and gave legal advice to individual defendants concerning matters unrelated to the business of the corporations, the privilege would be recognized.\textsuperscript{32} When these statements are compared, two conclusions are apparent: (1) The existence of the business relationship did not necessarily preclude the creation of a professional relationship. (2) Matters arising out of the business relationship were not attributable to the professional relationship and were not subject to the evidentiary and ethical strictures associated with the professional relationship. These conclusions may be useful in determining the effect of other kinds of nonprofessional relationships on the attorney-client relation.\textsuperscript{33}

Although the cases and opinions considered in this note do not provide a magic formula for deciding who is one's client, they do provide some guidance. The confidential relation may be created even though no fee is paid or contemplated. While the duty of confidentiality is an incident of every contract of retainer, the confidential relation itself is not contractual and may exist where the attorney has consented neither to employment nor to confidentiality. The existence of the relation is established when it is shown that advice and assistance of a kind typically and properly rendered by attorneys for clients were sought and that the confidences were disclosed to the attorney as an attorney rather than as, for example, a friend, relative, or business associate.

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\textsuperscript{31} Id. at 546.
\textsuperscript{32} Id. at 548.
\textsuperscript{33} See also Shoup v. Dowsey, 134 N.J. Eq. 440, 36 A.2d 66 (1944) (sister as client); Prigmore v. Hardware Mutual Ins. Co. of Minn., 225 S.W.2d 897 (Tex. Civ. App. 1949) (cousin as client); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951) (mother as client); ABA COMMITTEE ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 216 (1941) (friend as client).