

CHAPTER IV THE ATTORNEY-CLIENT RELATIONSHIP

I. NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is composed of many elements and has a complex of values and theoretical bases underpinning it. The relationship is based on contract, agency and fiduciary principles, but cannot solely be characterized as a contractual, agency or fiduciary relationship. In fact, the most appropriate response to the question “what is the nature of the attorney-client relationship” (as well as the question whether such a relationship exists in any given situation) is likely to be “why do you ask?”

Courts frequently refer to this complex of values in discussing the attorney-client relationship, and Missouri is no exception:

In general principle, the relationship of lawyer and client is contractual. . . . It is also a relation of agency, and its general contours are governed by the same rules. . . . It is, nevertheless, distinguished from other types of agency by its highly fiduciary quality and by the limit of its scope

Jarnagin v. Terry, 807 S.W.2d 190, 193-94 (Mo. App. 1991). In other cases, however, the courts will focus on a particular characterization of the relationship that is most relevant or appropriate to the issue at hand. See, e.g., *Baker v. Whitaker*, 887 S.W.2d 664, 669 (Mo. App. 1994) (“An agreement between an attorney and client should be construed under the same rules that apply to other contracts”); *Resolution Trust Company v. Gibson*, 829 F. Supp. 1121 (W.D. Mo. 1993) (“Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally”); *Kline v. Board of Parks and Recreation Com’rs*, 73 S.W.3d 63, 67 (Mo. App. 2002)(same); *Macke Laundry Service Limited Partnership v. Jetz Service Co.*, 931 S.W.2d 166 (Mo. App.1996) (The attorney-client relationship is one of agency.); *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92, 98 (Mo. App. 1992) (“Admittedly, an attorney hired by a client is . . . an agent with the normal fiduciary duties imposed by law and with specific ethical duties imposed as a condition of the privilege to practice law.”); *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. App. 1995) (“The relation between attorney and client is fiduciary and binds the attorney to a scrupulous fidelity to the cause of the client which precludes the attorney from any personal advantage from the abuse of that reposed confidence. . . . As a fiduciary, an attorney owes his client the greatest degree of loyalty, good faith and faithfulness.); *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995) (“The relation between attorney and client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on attorney’s part”).

Each characterization brings with it certain rights, duties and responsibilities. In any case where the existence or nature of the relationship is seriously in issue, it is necessary to look to these background principles for guidance.

II. WHEN DOES THE ATTORNEY-CLIENT RELATIONSHIP BEGIN?

“A fundamental distinction is involved between clients, to whom lawyers owe many duties, and non-clients, to whom lawyers owe few duties. It therefore may be vital to know

when someone is a client and when not.” RESTATEMENT OF THE LAW GOVERNING LAWYERS, Topic 1 Introductory Note (before § 14). Generally, there is no question regarding whether an attorney-client relationship has been created. Where a client seeks out an attorney in his or her office, requests representation and agrees to pay a fee, and the attorney agrees to undertake that representation, the relationship has clearly been established. But frequently, one or more of these factors are missing, and the question to be addressed is whether, despite this, an attorney-client relationship exists.

The Model Rules do not directly address when an attorney-client relationship is created. In fact, the Scope Note to the Rules explicitly negates any role for the Rules in this regard. Paragraph 3 states, “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.” The same paragraph does acknowledge that whether such a “relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”

The Restatement addresses the issue in § 14 as follows:

Formation of the Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so;
or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or 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.

The Restatement recognizes that, while this is the general rule for establishment of the attorney-client relationship, aspects of that relationship can be created at different times in different manners. Comment to § 14. The greater the duty to the client that is being asserted, and the more likely recognition of the relationship will “compel a lawyer to provide onerous services,” the less likely a full attorney-client relationship will be found. RESTATEMENT, Comment to § 14. Courts are loathe to impose fiduciary duties on attorneys where the lawyer has not agreed to enter into a relationship of that nature.

Missouri law on the subject was set out in *Resolution Trust Company v. Gibson*, 829 F. Supp. 1121, 1127 (W.D. Mo. 1993):

Under Missouri law, the attorney-client relationship is an agency relationship governed by the same law as that which applies to agency relationships generally. . . . An agency relationship results from “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo.1953); *Groh v. Shelton*, 428 S.W.2d 911, 916 (Mo. App.1968); *Dillard v. Rowland*, 520 S.W.2d 81, 90 (Mo.App.1974). An

agency relationship may be established by consent manifested in words and conduct. *Groh*, 428 S.W.2d at 916. Neither a contract nor an express appointment and acceptance is essential to the formation of an agency relationship. *Id.* Furthermore, in Missouri, "[t]he creation of the attorney-client relationship 'is sufficiently established when the advice and assistance of the attorney are sought and received in matters pertinent to his profession.'" *Erickson v. Civic Plaza Nat. Bank of Kansas City*, 422 S.W.2d 373, 378 (Mo.App.1967). See also *State v. Longo*, 789 S.W.2d 812, 815 (Mo.App.1990) (citing *Erickson* for the same proposition).

Where parties can prove that they "sought and received legal advice and assistance and that [the lawyer] intended to undertake to give such advice and assistance on their behalf . . . , the attorney-client relationship may be found to exist." *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995). However, "reliance alone upon the advice or conduct of a lawyer does not create an attorney-client relationship." *Id.*, citing Ronald E. Mallin and Jeffrey M. Smith, LEGAL MALPRACTICE ¶ 8.2, at 96 (3rd. ed. Supp. 1993). "It is the client's reasonable belief that an attorney is representing him" that provides the basis for recognizing the existence of the relationship. *Longo*, 789 S.W.2d at 816 (in the context of the attorney-client privilege).

In any case where the existence of an attorney-client relationship is in issue, it will be necessary to identify the nature of the duties and responsibilities that are at issue and to determine the existence of the relationship in that context. There is a tension between protecting legitimate interests of prospective clients, who are not in the best position to judge whether the relationship has been created, and the right of an attorney to freely choose whether to enter into such a relationship. Many courts now err on the side of the client where the lawyer could have clarified the matter and did not. It is therefore a good idea for an attorney who does not undertake to represent a potential client after an initial consultation (or what could be reasonably construed as one) to send a non-engagement letter to that individual. For further discussion of these issues, see RESTATEMENT, Comment and Reporter's Note to § 14; ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, 31:101-106.

III. ESSENTIAL REQUISITES OF THE ATTORNEY-CLIENT RELATIONSHIP

A. *The Lawyer's Duties to the Client*

The Restatement addresses the basic requisites of the attorney-client relationship in § 16 as follows:

To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;

(2) act with reasonable competence and diligence;

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

Where in the Model Rules is each of these duties addressed? What is the source of each of these obligations (contract, agency or fiduciary duty), and how does that source impact on the definition and scope of the duty? As we address each of these obligations individually throughout the semester, we will address these and other questions regarding each of these duties.

Some duties may arise even before representation is undertaken or even if no relationship ever materializes. Section 15 of the Restatement sets out the duties a lawyer owes to a prospective client. These duties are significantly less than the duties owed once a relationship ensues.

Note that a lawyer's duties to his or her client may be limited by an agreement between the lawyer and the client, RESTATEMENT §18,19. Pursuant to the Model Rules, a lawyer may limit the objectives of a representation if the client consents after consultation. M.R. 1.2(c).

B. Decision-Making Within the Attorney-Client Relationship

Within the attorney-client relationship, the attorney and client may allocate decision-making authority by agreement. RESTATEMENT § 21. Absent such agreement, a lawyer shall abide by a client's decisions regarding objectives and shall consult with the client regarding means. M.R. 1.2(a); see also RESTATEMENT §§ 22,23. The attorney has a duty to communicate with the client to the extent necessary to effectuate this decision-making authority. M.R. 1.4; RESTATEMENT § 20.

To a large extent, concepts of agency govern issues of decision-making and authority within the attorney-client relationship. Thus, courts generally look to agency concepts in resolving questions regarding the authority of the attorney to bind the client. See *Rosenblum v. Jacks or Better of America*, 745 S.W.2d 754, 760-61 (Mo. App. 1988). Because of the fiduciary nature of the relationship and the professional role of the attorney, however, these concepts are instructive, but are not conclusive, in determining these issues. See generally LAWYER'S MANUAL at 31:301-304. This is especially true where settlement of litigation is involved.

Who should "control" aspects of the attorney-client relationship? Does it (should it) matter, as the Rules appear to instruct, whether objectives or means are involved? Why or why not? Is the line between objectives and means always that clear? Can you imagine a situation in which a client might be more concerned with means than with ultimate ends?

There are several theories that address authority and control within the attorney-client relationship. The standard conception, based on client autonomy, is a client-centered approach. Under this theory, it is not for the lawyer to judge the client's objectives or means, nor is the lawyer accountable for them, at least once representation has been undertaken. The lawyer's job is to advance the client's interests, as defined by the client. Doing so advances the autonomy of the client, and is supported by principles of partisanship and neutrality. Those who favor this view characterize it as non-judgmental; those who disparage this concept of lawyering characterize the lawyer who plays this role as a "hired gun."

A second view is sometimes termed the moral activist or directive approach. Proponents of this theory reject the extreme role-differentiation they perceive under the standard conception, and believe that lawyers must take a broader view of their obligation to influence clients to make what the lawyer believes to be the morally appropriate choices. Where the lawyer has discretion, he or she is to act in ways that are likely to promote justice. Critics of this approach question why the lawyer's view of morality or justice should control over the client's interests.

A third approach, based on practical rather than theoretical considerations, is more in the nature of the business model. The lawyer asks what actions and approaches will best advance good client relations and make the client happy and acts in accordance with the answers to those questions. Moral issues are relevant only to the extent the client makes them so.

A final approach that has been suggested is a collaborative model, in which the lawyer and client resolve issues together through moral discourse. It is urged that this is the best approach. In this model, the client makes the ultimate decision, but the lawyer is actively involved in the process of determining what course should be chosen. The lawyer does not impose his or her moral views on the client, but works with the client to help the client articulate his or her own moral position. While this model works well in theory, it is harder to make work in practice.

What are the pros and cons of each approach? Which is more consistent with your own views of lawyering and legal practice?

Finally, an important emerging dimension of the lawyer-client relationship relates to cultural competence. As our society becomes more diverse, an attorney needs to be sensitive not only to the stated objectives of the client, but to the cultural context in which the attorney-client relationship exists. It is important for lawyers to be cognizant of the extent to which their own cultural context influences their understanding and expectations of their clients and to be aware of the extent to which cultural differences can impact the attorney-client relationship. Among the issues attorneys must pay attention to are perception and use of interpersonal space, body language, time and priority considerations, narrative preferences, individual vs. collective orientation and scientific orientation. To be sensitive and effective in this regard, lawyers should cultivate their own cultural identities, acknowledging biases and oppression that their culture contains. See generally, Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. Rev.* 373, 385-414 (2002); Michelle Jacobs, *People from the Footnotes: The Missing Element of Client-Centered Counseling*, 27 *Golden Gate U. L. Rev.* 345, 400-401 (1997); Susan Bryant, *The Five Habits: Building Cross Cultural Competence in Lawyering*, 8 *Clinical L. Rev.* 33 (2001).

IV. THE FINANCIAL ASPECTS OF THE ATTORNEY-CLIENT RELATIONSHIP

Except in cases of pro bono representation, the client will generally have a financial relationship with the attorney as part of the attorney-client relationship. What is appropriate with regard to fees?

Model Rule 1.5 governs attorneys' fees. M.R. 1.5 (a) prohibits the charging of unreasonable fees or expenses. See also RESTATEMENT §34. The Rule sets out factors that are

to be considered in determining reasonableness, but does not prioritize among those factors. In general, where a fee is negotiated at arms' length between a lawyer and client with generally equal bargaining power, it will rarely be second-guessed. Lawyers must communicate the scope of the representation and the basis or rate of the fee to be charged early in the representation, preferably in writing. M.R. 1.5(b).

There are many types of fees, including hourly fees, flat fees, contingent fees and hybrids. Special rules govern the use of contingency fees. See RESTATEMENT §35. They are prohibited in criminal and domestic cases, M.R. 1.5 (d), and, where an alternative fee would better serve the client's interests, that alternative should be offered to the client. See Comment, ¶3. Additionally, special rules require that contingent fees be in writing. See M.R. 1.5(c) for these requirements.

Lawyer-client fee contracts are not directly addressed by the rules, but guidance is provided in the Restatement. See RESTATEMENT § 38. Splitting of fees is addressed in the Rules, however. Lawyers not in the same firm can only split fees under limited circumstances, see M.R. 1.5(e) and RESTATEMENT § 47, and lawyers may not split fees with non-lawyers. See M.R. 5.4.

V. TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

Generally, an attorney is expected to continue representation of a client until the matter for which the attorney has been retained has been completed. In some situations, either the attorney or the client will want to end the relationship prematurely. Model Rule 1.16 governs the termination of the attorney-client relationship. That Rule makes withdrawal mandatory in certain circumstances (see 1.16(a)) and permits withdrawal in others. (See 1.16(b)). Read Rule 1.16. Generally, the Restatement is in accord with the Rules. See RESTATEMENT § 32. Termination of the relationship ordinarily ends the attorney's authority to act on behalf of the client. See RESTATEMENT § 31. With regard to withdrawal, see generally LAWYER'S MANUAL at 31:1001-1212.

Whenever an attorney withdraws from representation, the attorney has an obligation to take reasonable steps to protect the client's interests. This may include giving reasonable notice of the intent to withdraw, surrendering property and papers of the client and refunding any unearned fees. See M.R. 1.16(d); RESTATEMENT § 33. Where litigation is involved, the attorney may need permission of the court to withdraw. See M.R. 1.16(c)(2002).