The Accidental Client

Disputes between lawyers and people claiming to be their clients usually end badly for lawyers.

Some years ago, a professor at the University of Toledo College of Law wrote a law review article[1] describing what are sometimes known as "accidental clients"—people whom the lawyer had no intention of representing, sometimes not even knowing they existed, but to whom the lawyer ends up being liable just as though a formal representation had been originally intended. This can have disastrous consequences for the lawyer and results from a variety of factors, mostly because of confusion over the legal relationship between a client the lawyer acknowledges as such and the non-client person with whom that client is dealing[2]—or, more usually, because of a misimpression the lawyer has given to an unrepresented party to the effect that the lawyer is protecting that party's interest.

It's this second category of accidental client that is the focus of this column.

If the law review article were not as long (43 pages with 202 footnotes), it should probably be required reading for every lawyer entering the practice, not because it deals with situations they will deal with every day, but because of the severe consequences at risk that usually could have been avoided.

We need to start with ER 4.3 (Dealing with Unrepresented Person),[3] which states in part:

> 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 …

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The rule applies only in instances when the lawyer is formally representing another person, but the consequences of allowing another person to be confused about your role in a matter can be the same regardless of context. If you would like to see an example of what can befall a lawyer who ignores this simple admonition, look no further than the Arizona case of *Franko v. Mitchell*.[4] There, the lawyer was asked by an acquaintance, Mr. Markoff, to draw up "papers" evidencing a loan of $30,000 to Markoff from his girlfriend to be secured by a life insurance policy Markoff said he owned. The terms of the agreement, to be included in a promissory note, were also to provide that half the obligation would be paid when Markoff sold his home and that he would pay off the balance from the profits of the bar he was going to purchase with the money his girlfriend was loaning him. Mr. Markoff called the lawyer to make an appointment to draw up the note describing the deal, and both he and the girlfriend went to the lawyer's office to consummate the transaction. Markoff told the lawyer what they wanted, and the lawyer drew up the note while Markoff and the girlfriend waited. Markoff reviewed the document and signed it. While the girlfriend was sitting in front of him, the lawyer suggested to her that she have the premium notices for the life insurance policy sent to her so she could be assured that it didn't lapse. When the girlfriend asked the lawyer if the note was "legal" and "had everything it should have," the lawyer said that it was and that it did. When she asked what she should do with it, the lawyer told her to keep it in a safe place. After Markoff signed the note, he paid the lawyer and he and the girlfriend left the lawyer's office.

Unfortunately, all did not go as planned by the girlfriend. Mr. Markoff apparently did not use the money to buy a bar, and the proceeds from the sale of his home never found their way to the girlfriend. These were, of course, conditions for the loan that a competent lawyer representing the girlfriend could have assured would happen before she wrote the check. By the time she discovered there was no life insurance policy, Markoff had disappeared. Again, a competent lawyer representing the girlfriend would have insisted that a life insurance policy currently in force be presented with the appropriate beneficiary designation.

The girlfriend sued both Markoff and the lawyer, and, when Markoff defaulted, the case proceeded against the lawyer alleging that there had been an attorney–client relationship between them and that she was entitled to recover her damages by way of a *Fickett*-type derivative liability.[5] The trial court granted summary judgment in favor of the lawyer on the ground that there was, as a matter of law, no attorney–client relationship. On appeal, the court held that the relationship of the parties did not lend itself to any sort of derivative liability analysis, but reversed the trial court on the ground that the girlfriend had shown sufficient facts that could have led her to a reasonable subjective belief that the lawyer was protecting her interests. The court held that the girlfriend could have a trial on the attorney–client issue and amend her complaint to allege a direct cause of action for malpractice if the relationship was found to exist. In the process, the court gave us a quick review of how attorney–client relationships can arise—even

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when unintended by the lawyers involved.

- Whether an attorney–client relationship exists presents an issue for the trier of fact.[6] Keep in mind that the reported decisions involving factual disputes between lawyers and people claiming to be their clients have usually ended badly for the lawyers.
- An attorney–client contract may be implied from the conduct of the parties.[7]
- The relationship is proved by showing that the party sought and received advice and assistance from the lawyer in matters pertinent to the legal profession.[8]
- The appropriate test is a subjective one, where the court looks to the nature of the work performed and the circumstances under which any confidences could have been divulged.[9]
- The relationship, once established, is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship can no longer be depended upon.[10]

The court then found that the lawyer's statements to the girlfriend concerning the insurance policy and the completeness of the note could be viewed as "logically consistent" with an attorney–client relationship and that she had legally sustained an inference that the lawyer was acting as her attorney.

The upshot of all of this is that it is the lawyer's obligation to see any potential problem in this area before it arises and further that it is the lawyer's sole responsibility to do something about it. Otherwise, a simple, honest misunderstanding can result in a court constructing an attorney–client relationship that the lawyer would never have entered into willingly, with all its attendant liabilities, and for which the lawyer will probably never get paid. AZ AT

endnotes

1. Susan R. Martyn, *Accidental Clients,* 33 Hofstra L. Rev. 913 (March 2006).
2. *See, e.g., Fickett v. Superior Court,* 558 P.2d 988 (Ariz. Ct. App. 1976) (lawyer for guardian liable for client's acts damaging ward); *but see* A.R.S. § 14-5652, which probably controls in probate matters. This is discussed in *Derivative Liability Revisited,* Ariz. Att'y (Sept. 2016) at 8.
3. Rule 42, Ariz.R.S.Ct.
4. 762 P.2d 1345 (Ariz. Ct. App. 1988).
5. *See* note 2, referring to *Fickett.*
6. 762 P.2d at 1351.
7. *Matter of Petrie,* 742 P.2d 796 (Ariz. 1987).
8. *Id.* at 800-801.
9. *Alexander v. Superior Court,* 685 P.2d 1309 (Ariz. 1984).
10. *In re Weiner,* 586 P.2d 194 (Ariz. 1978); *see also In re Neville,* 708 P.2d 1297 (Ariz. 1985).