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Minn. L. Rev. Editorial Board

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Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship

Joan Togstad’s husband was paralyzed while undergoing hospital treatment for a cerebral aneurysm. Togstad, believing that there was a possible malpractice cause of action against the attending physician, consulted attorney Jerre Miller. In an interview at Miller’s office, Miller questioned Togstad and took notes while she related the circumstances leading to her husband’s paralysis. At the close of the interview, Miller told Togstad that it was his opinion that the facts were insufficient to support a malpractice action against her husband’s physician. Nevertheless, because Miller was inexperienced in the medical malpractice area, he told Togstad that he would consult an expert medical malpractice attorney and contact her if the attorney’s opinion was different from his own. When Miller did not contact Togstad, she assumed that he would not be representing her and that his opinion on the merits of the claim was correct.

Ten months later, Togstad learned that there was a strong likelihood that Miller’s advice was erroneous. By this time, however, the two-year statute of limitations for bringing medical malpractice actions against physicians had expired. As a result, the Togstads brought a legal malpractice action against Miller to recover any dam-

1. A clamp had been left on one of John Togstad’s arteries for an extended period of time without proper adjustment; as a result, he suffered paralysis and severe impediment to his speech and writing. Transcript of Proceedings at 117, Togstad v. Vesely, Otto, Miller & Keefe, No. 722846 (Minn. Dist. Ct., Hennepin Cty., Sept. 26, 1978) (Order) [hereinafter cited as Transcript].

2. The interview lasted between 30 and 60 minutes. Id. at 46.

3. Id. at 42, 46, 53. Miller gave his opinion without examining medical records or researching the legal issue. Id. at 134. He also failed to disclose to Togstad that there was a short statute of limitations for medical malpractice actions. Id. at 137. Miller testified that “[t]he only thing I told her . . . was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking.” Id. at 120.

4. Prior to his interview with Togstad, Miller had never represented a client in a medical malpractice action. Id. at 133.

5. At trial, both parties testified that Miller had stated that he would confer with another attorney, and if he did not contact Togstad, she was to assume his opinion was correct. Togstad assumed Miller would contact one of his associates. Id. at 42, 53, 121.

6. Approximately one week after the interview at Miller’s office, Togstad came to the conclusion that defendant would not be representing her husband’s claim. Id. at 53, 54, 69.

7. See Minn. Stat. § 541.07 (1978).

8. Transcript, supra note 1, at 54.
ages that would have been awarded in a suit against Togstad’s doctor. Miller defended on the ground that an attorney-client relationship was not created by his discussion with Togstad. The jury found that an attorney-client relationship had existed and returned a verdict for the Togstads. The district judge denied Miller’s motion for judgment notwithstanding the verdict, ruling that there was sufficient evidence for the jury to reasonably conclude that an attorney-client relationship had existed. Togstad v. Vesely, Otto, Miller & Keefe, No. 722846 (Minn. Dist. Ct., Hennepin Cty., Sept. 26, 1978).

The attorney malpractice action is intended to compensate those who suffer loss due to an attorney’s negligence, as well as to give attorneys an incentive to exercise their professional responsibilities with care. Courts disagree on the underlying theory of the attorney malpractice action. Some view it as a contract action that arises from the attorney’s breach of an implied promise to use a reasonable degree of skill and care in the exercise of his professional duties.


10. Order Denying Defendants’ Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial, Togstad v. Vesely, Otto, Miller & Keefe, No. 722846 (Minn. Dist. Ct., Hennepin Cty., Sept. 26, 1978) [hereinafter cited as Order]. In addition to the attorney-client relationship issue, the defendant on motion argued that: (1) plaintiff must show not only that the attorney was liable but that any judgment against John Togstad’s physician would have been collectible; (2) the court committed error in failing to tell the jury that damages should have been reduced by the contingent fee payable to the attorney if the first action was successful; and (3) the court failed to give the curative instruction requested by defendants to the jury. Id. at 6-9; Memorandum, supra note 9, at 10-13.

11. The jury awarded damages in excess of $600,000 to the Togstads. Togstad v. Vesely, Otto, Miller & Keefe, No. 722846 (Minn. Dist. Ct., Hennepin Cty., Sept. 26, 1978). The judge ruled against the defendant on the other issues as well. Id.

12. In order to prevail in an attorney malpractice action such as Togstad, it is necessary for the plaintiff to prove that he would have recovered damages in the original suit that the defendant-attorney’s negligence prevented him from bringing. See generally Ronningen v. Hertogs, 294 Minn. 7, 9, 199 N.W.2d 420, 421 (1972); Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970); Coggin, Attorney Negligence . . . A Suit Within a Suit, 60 W. Va. L. Rev. 225, 233-38 (1958). Although of relatively recent origin, attorney malpractice actions are recognized in every American jurisdiction. See Note, Attorney Malpractice, 63 COLUM. L. REV. 1292, 1292 (1963) (citing Blaustein, Liability of Attorney to Client in New York for Negligence, 19 BROOKLYN L. REV. 233, 236 (1953)). It has been estimated that in the last decade the total number of legal malpractice suits has doubled. See N. Y. Times, Feb. 28, 1977, at 44, col. 6.

13. See Note, supra note 12, at 1292 and authorities cited.

14. Id.

Others view it as a tort action that results from the attorney's breach of the duty to use due care created by the attorney-client relationship. Under either theory, the plaintiff must establish certain elements in order to recover. These elements are: (1) that an attorney-client relationship existed; (2) that the defendant committed acts constituting negligence or breach of contract; (3) that the plaintiff was damaged; and (4) that the acts of the attorney were the factual and proximate cause of the damage.

In determining whether an attorney-client relationship exists, courts have often used a contract analysis regardless of whether the plaintiff's suit was in contract or tort. Under contract principles, an attorney-client relationship clearly exists when the attorney expressly agrees to represent the client. Most jurisdictions also recognize that an attorney-client relationship is present when the conduct of the parties gives rise to an implied contract. For example, even though


17. An attorney-client relationship is the primary requirement for a legal malpractice action. See, e.g., Ronnigen v. Hertogs, 294 Minn. 7, 9, 199 N.W.2d 420, 421 (1972).


19. When the action is one in negligence, the attorney has no duty to the plaintiff unless there is an attorney-client relationship. According to most courts, the relationship is created by contract; the question of its existence, therefore, has traditionally been resolved through use of contract principles. See Wade, supra note 15, at 756.

20. For an example of an express contract, see Sitton v. Clements, 385 F.2d 869, 870 (6th Cir. 1967) (defendant attorney wrote on a letter requesting his services: "I hereby accept employment on the above terms."). Some courts will find that an attorney-client relationship exists only when there is an express contract:

   The legal relationship of attorney and client is purely contractual and results only from the mutual agreement . . . of the parties . . . . Such relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay . . . .

Delta Equip. & Constr. Co. v. Royal Indemn. Co., 186 So. 2d 454, 458 (La. App. 1966); see Board of Comm'rs v. Jones, 291 Ala. 371, 377, 281 So. 2d 267, 273 (1973) ("in order to create an attorney-client relationship, we hold that there must be a contract of employment, the same as in other cases of contract.").

21. The contract arises from the conduct of the parties and is often referred to as "implied-in-fact." See A. CORBIN, CORBIN ON CONTRACTS § 18 (1 vol. ed. 1952).
the attorney does not expressly accept a person as a client, if the
dee has undertaken any efforts on the person's behalf or if any
fee has been paid, an attorney-client relationship has commonly been
held to exist under principles of implied contract. Although courts
in some recent cases have not referred to contract principles in deter-
mining whether an attorney-client relationship was present, most
courts continue to require a contractual relationship between the
parties in malpractice actions.

The first Minnesota case to consider the question of when an
attorney-client relationship exists was Ryan v. Long. In Ryan, the
plaintiff consulted the defendant attorney on a legal matter and the
attorney gave him his professional opinion. Although the court found
that there was an attorney-client relationship, it did not indicate
whether its conclusion was based on contract principles or a tort
theory.

In more recent decisions, however, the Minnesota Supreme
Court appears to have determined whether an attorney-client rela-
tionship existed by using a contractual analysis. In Christy v. Saliterman, the plaintiff brought an action against an attorney for

Neither contractual formality, compensation, nor expectation of compensation is re-
quired for an implied-in-fact contract. See Shoup v. Dowsey, 134 N.J. Eq. 440, 475-
1968) (defendant attorney's silence in response to plaintiff's request for his services
insufficient to create the necessary implied contract).

22. See, e.g., Christy v. Saliterman, 288 Minn. 144, 150-51, 179 N.W.2d 288, 294

of New Jersey imposes the duties incident to such a[n attorney-client] relationship
on one who merely 'assumes to give legal advice and counsel'") (quoting Shoup v.
Dowsey, 134 N.J. Eq. 440, 475-76, 36 A.2d 66, 85 (1944)); Kurtenbach v. TeKippe, 260
N.W.2d 53, 56 (Iowa 1977) ("The relationship is created when (1) a person seeks advice
or assistance from an attorney, (2) the advice or assistance sought pertains to matters
within the attorney's professional competence, and (3) the attorney . . . agrees to give
or actually gives the desired advice . . . .") (emphasis added). See also In re Palmieri,
76 N.J. 51, 57, 385 A.2d 856, 860 (1978); In re Makowski, 73 N.J. 265, 269, 374 A.2d


25. 35 Minn. 394, 29 N.W. 51 (1886).

26. The Ryan court stated,

[I]t sufficiently appears that plaintiff, for himself, called upon defendant,
as an attorney-at-law, for "legal advice," and that defendant assumed to give
him a professional opinion in reference to the matter as to which plaintiff
consulted him. Upon this state of facts the defendant must be taken to have
acted as plaintiff's legal adviser, at plaintiff's request, and so as to establish
between them the relation of attorney and client.

Id. at 394, 29 N.W. at 51.

27. 288 Minn. 144, 179 N.W.2d 288 (1970).
failing to file a medical malpractice suit within the statute of limitations. Although the court recognized that an attorney malpractice action can be brought under either negligence or contract theories,\(^28\) in affirming the jury’s finding of an attorney-client relationship the court stated: “We think that the record . . . amply supports the finding . . . that a contract for professional services was entered into . . .”\(^29\) That the court viewed the issue in contractual terms is also evidenced by the opinion’s reference to “the retainer agreement” between the parties as further support for the jury’s finding.\(^30\)

In Ronningen v. Hertogs,\(^31\) the Minnesota Supreme Court again resolved the issue of the existence of an attorney-client relationship by use of contract principles. The plaintiff in Ronningen claimed that he retained the defendant as his attorney and that the defendant failed to prosecute a tort claim. In upholding a directed verdict for the defendant, the court concluded that “[u]nder the fundamental rules applicable to contracts of employment . . . the evidence would not sustain a finding that defendant either expressly or impliedly promised or agreed to represent plaintiff . . . .”\(^32\)

In Togstad, the district court also addressed the question of attorney-client relationship in contractual terms. In approving the jury’s finding that an attorney-client relationship existed between Miller and Togstad, the judge, noting that Togstad requested legal advice and that Miller assented and gave his legal opinion,\(^33\) reasoned that “[w]hen the attorney gives advice . . . [to] the person in his office in regards to a legal matter, an attorney-client contractual relationship arises.”\(^34\) Moreover, the judge noted that Togstad’s failure to sign a retainer was of “little significance,” and stated that the

\(^{28}\) Id. at 150, 179 N.W.2d at 294 (“Once it has been established that the relationship of attorney and client exists and that plaintiff has sustained damages by reason of the attorney’s negligence or breach of contract, the right to recover is established.”).

\(^{29}\) Id. Defendant attorney had obtained authorization to examine plaintiff’s medical records. Moreover, when plaintiff and his wife asked defendant how the medical malpractice case was progressing, he assured them that “it’s all been taken care of.” Id. at 150-51, 179 N.W.2d at 294.

\(^{30}\) Id. at 150, 179 N.W.2d at 294.

\(^{31}\) 294 Minn. 7, 199 N.W.2d 420 (1972).

\(^{32}\) Id. at 11, 199 N.W.2d at 422. In the course of representing his client’s claim, the attorney had an incidental discussion with the plaintiff. The plaintiff contended that as a result of this discussion an attorney-client relationship was created. Id. at 9-10, 199 N.W.2d at 422. The court held that the plaintiff proved “no more than an expectation to employ defendant.” Id. at 10, 199 N.W.2d at 422.

\(^{33}\) Order, supra note 10, at 4.

\(^{34}\) Id. at 2 (emphasis added). In support of this proposition the judge cited Ryan. Id. Ryan, however, did not hold that the attorney-client relationship was a contractual one. See note 26 supra.
fact that Miller did not receive a fee had no bearing on whether an attorney-client relationship existed between the parties. Consideration and the other formal elements of contract are not necessary to create an attorney-client relationship, the judge concluded, because the attorney-client contractual relationship is a "special type of contract which cannot be categorically defined, but must be determined on a case by case basis."35

The district judge in Togstad apparently thought that there could be no attorney-client relationship between Miller and Togstad unless the two parties had agreed on some type of contract. This view no doubt resulted from the emphasis that the Minnesota Supreme Court had placed on the contractual nature of the attorney-client relationship in Christy and Ronnigen.37 But the judge in Togstad was forced to depart from a conventional contract analysis in order to find the requisite relationship between Miller and Togstad. As the opinion itself suggests, no contract existed under traditional principles of contract law, because the elements of offer, acceptance, and consideration were absent.38

Furthermore, the judge's contention that a "special kind of contract"39 nonetheless existed between the parties is questionable. Even if the element of consideration were ignored, the basic contract requirement that there be an express or implied promise40 between the parties was not satisfied in this case.41 Miller did not agree to represent Togstad, nor did he take any action indicating his intention to do so.42 Because it is virtually impossible to infer a promise on the

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35. Id. at 5.
36. Id. at 2.
37. See notes 27-32 supra and accompanying text.
38. Order, supra note 10, at 3 ("Since a contract between an attorney and his client is a special type of contract [it] may be found on the basis of a variety of factors . . . .").
39. Id. at 2.
40. See A.COBIN, supra note 21, § 1, at 2 ("That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise.").
41. See Ronnigen v. Hertogs, 294 Minn. 7, 11, 199 N.W.2d 420, 422 (1972). The literal language of Ronnigen, see text accompanying note 32 supra, seems to indicate that the court would find no attorney-client relationship unless the attorney specifically agreed to represent the plaintiff.
42. It is clear from the testimony at trial that Togstad knew that Miller would not be representing her claim. See note 6 supra. Miller's statement that he would contact Togstad after conferring with another attorney on the matter is the only aspect of the interview between the parties that could be characterized as a promise and could arguably be used to establish a contractual attorney-client relationship. See note 5 supra. Nevertheless, the judge based his ruling principally on the fact that a contract was created when Miller offered advice.
part of Miller, the finding that an offer and acceptance took place when Togstad requested and received a legal opinion from Miller strains the contract model beyond its logical limits.43

The foregoing analysis suggests that if the contract test enunciated in Christy and Ronnigen had been literally applied in Togstad, the judge would have been unable to find that an attorney-client relationship existed between Miller and Togstad. Such a result, however, would be undesirable from a policy standpoint. Miller negligently gave incorrect legal advice, and Togstad reasonably relied on it to her detriment. If a lawyer could avoid liability in such a situation by claiming that there was no contract between the plaintiff and himself, the policies underlying attorney malpractice actions would be frustrated. There would be no incentive for lawyers who have not been formally retained to refrain from negligently giving legal advice, and parties harmed by such negligent advice would be uncompensated.

Cases such as Togstad demonstrate a basic dilemma faced by courts attempting to define the appropriate scope of attorney liability without rejecting the contract analysis for determining the existence of an attorney-client relationship. The contract test leads to equitable results in cases like Christy, where the lawyer’s actions clearly indicate that he has undertaken the representation of a client.7 It also operates satisfactorily in cases like Ronnigen, where it is clear that the lawyer has not given legal advice to the plaintiff, much less been retained by him.48 In a case such as Togstad, however, where a lawyer

43. See Order, supra note 10, at 4.
44. The doctrine of promissory estoppel would not operate to create a contract between Miller and Togstad. This doctrine holds that “[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT OF THE LAW OF CONTRACTS § 90 (1932). In order to invoke this doctrine there must be an antecedent promise, and Miller made no promise to represent Togstad.
45. See notes 49-53 infra and accompanying text.
46. See note 13 supra and accompanying text.
47. In Christy, the jury found that there was a retainer agreement. Thus, even under the narrowest application of the contract test it was proper to find an attorney-client relationship. 288 Minn. at 150, 179 N.W.2d at 294.
48. In Ronnigen, the plaintiff had only an expectation to retain the attorney who neither gave legal advice nor took any action indicating his intention to represent the plaintiff. Even under the broadest application of the contract test, an attorney-client relationship was not created. 294 Minn. at 10, 199 N.W.2d at 422 (1972).
has given a professional opinion but there is no reasonable basis for inferring that any type of agreement existed between the parties, the concept of contract must be severely distorted in order to find an attorney-client contractual relationship.

If the contract on which an attorney-client relationship is predicated is often nothing more than a fiction, the contract approach to this problem should be abandoned unless it serves some useful analytical purpose. The contract approach is not a useful analytical tool for determining the existence of an attorney-client relationship because a lawyer's duty to exercise reasonable care in giving professional advice frequently does not arise from contract, but from the position the lawyer occupies as an expert in legal matters. Because of his assumed expertise, the lawyer is in a unique position to cause harm if he gives erroneous legal advice to a person who has consulted him. Under general principles of tort law, the lawyer has a duty not to act negligently when others may be injured by his negligence. When his advice is sought, the lawyer is not unlike the driver of a car who is under a duty not to create an unreasonable risk of harm to others by driving negligently. Like the driver, the lawyer's duty does not arise from a contract, but from the traditional tort principle that a duty of care is created whenever a person engages in conduct that may create an unreasonable risk of harm to others.

This analysis suggests that the existence of an attorney-client relationship should be determined by tort rather than contract principles. Whenever a lawyer gives legal advice, he is in a position to create an unreasonable risk of harm due to the negligent exercise of his professional skills. There is a strong likelihood that the advice will be relied on by a layman even if it is erroneous. The court has indicated that an attorney malpractice action may be brought for breach of an implied contract to exercise reasonable skill in performing professional duties, but it would be desirable to drop this fiction and recognize that the attorney malpractice action is in fact a negligence action. An important step in this direction would be to adopt a test for the attorney-client relationship based on the notion that the existence of that relationship is fundamentally a question of whether a

49. See generally W. Prosser, supra note 16, at § 53.

50. The lawyer who offers gratuitous advice is in a position analogous to the physician who witnesses a traffic accident. The law does not impose a duty on physicians to treat a victim of the accident. Should the physician undertake to treat a victim, however, he will be liable if he does so negligently. See id. § 56, at 340-48. Similarly, if a lawyer voluntarily offers legal advice to an individual, an attorney-client relationship should be deemed to be established and he should be liable if his negligence causes harm to the individual.

51. See note 28 supra.
lawyer has assumed a duty toward a person by offering legal advice. Such a test might be formulated as follows: An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.\textsuperscript{52}

The application of this test would have important advantages over the contract analysis currently employed by Minnesota courts. First, since it is more consistent with the view that an attorney malpractice action is an action in tort, not contract, use of this test would help achieve doctrinal consistency. Second, and more important, the proposed test would require the finding of an attorney-client relationship in those situations in which both policy and fairness dictate that lawyers be held accountable for their acts of negligence.\textsuperscript{53}

The test would help define the appropriate scope of liability in attorney malpractice actions. On the one hand, the scope of the liability imposed would not be too broad. The proposed test imposes no affirmative duty on lawyers to offer legal advice to all individuals who seek it, and the lawyer would remain free to choose his own clients by refusing to give legal advice to a party who requests it. Moreover, an attorney could give his view of a particular legal issue without subjecting himself to potential liability if it is not reasonable for the person seeking the advice to rely on it. In other words, the offering of a legal opinion would have to be given in an atmosphere of sufficient formality to justify an expectation that the advice is reliable. Thus, an attorney’s opinion given to a friend at a cocktail party with the warning that the advice is largely uninformed should probably not give rise to an attorney-client relationship.\textsuperscript{54}

On the other hand, the scope of the liability imposed by the suggested test would not be as narrow as that resulting from application of traditional contract principles. The test would quite clearly

\textsuperscript{52} For a similar formulation, see Blaustein, \textit{Liability of Attorney to Client in New York for Negligence}, 19 Brookly L. Rev. 233, 243 ("The test in these cases should be whether the attorney has held himself out as one who is applying his professional skill to help the other party."). See also M. Clark & C. Wolfram, \textit{Professional Responsibility: Issues for Minnesota Attorneys} 154 (Minnesota Continuing Legal Education 1976) ("[T]he existence of the attorney-client relationship for legal malpractice purposes will be found . . . where the consultation . . . has been conducted in a serious and formal manner and the attorney is shown to have spoken definitively on the legal question.").

\textsuperscript{53} The proposed analysis may create an expanded scope of liability. The consequences, however, will not be harmful to the profession. It is both a desirable and attainable goal to make attorneys more cautious and circumspect when offering advice to those who seek it.

\textsuperscript{54} Under these circumstances, the attorney’s disclaimers operate to make it unreasonable for the friend described to place reliance on the statements.
result in the determination that an attorney-client relationship existed in Togstad, since the legal advice was given at Miller's law offices under circumstances in which it was reasonable for Togstad to rely on it. Instead of requiring a court to engage in the kind of unconvincing contract analysis used in Togstad, the test proposed here would allow courts faced with similar cases to find the existence of an attorney-client relationship by focusing on the duty imposed on a lawyer when he gives legal advice.

The contract analysis traditionally employed by courts for determining the existence of an attorney-client relationship was justified on the ground that no lawyer should be held to a professional standard of care unless it is clear that he had agreed to represent a prospective client. This view was arguably incorrect from its very inception, because it tended to insulate a lawyer from liability even in situations in which it could be expected that a layman might be harmed by negligent legal advice. Moreover, the original policy objective is no longer served with the advent of cases like Togstad which purport to apply a contract analysis even though there had been no agreement between the attorney and the plaintiff. These considerations, combined with the advantages of the alternative analysis recommended by this Comment, argue in favor of the Minnesota Supreme Court abandoning the contract approach for determining the existence of an attorney-client relationship and deciding such cases on the basis of tort principles.

55. See Wade, supra note 15, at 756.
56. See Note, supra note 12, at 1312.
J. Morris Clark
1944-1979