

# CHICAGO LAWYER

## Client relationships: Illinois cases split over attorney consent

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As the title implies, this column will address issues related to legal malpractice. Usually, before legal malpractice can occur, there needs to be an attorney-client relationship. Most of the time, the attorney and the client both understand when an attorney-client relationship has been formed, because it is the subject of their express agreement. This first column will address whether an attorney can owe duties to a client that the attorney has not agreed to represent.

There are several Illinois cases that suggest that an attorney-client relationship can be formed without the attorney's consent. For example, in *Herbes v. Graham*, 180 Ill. App. 3d 692, 699 (2d Dist. 1989), the court held that: "Taken together, the cases teach that an attorney-client relationship need not be explicit or expressed and is not dependent on the amount of time the client spends with the attorney, the payment of fees or execution of a contract, the consent of the attorney, or the actual employment of the attorney." *Herbes* is not alone in its holding. E.g., *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978); *United States v. Evans*, 954 F. Supp. 165, 167-68 (N.D. Ill. 1997); *Newton v. Newton*, 2011 IL App (1st) 090683; *Morris v. Margulis*, 307 Ill. App. 3d 1024, 1037 (5th Dist. 1999), rvd, 197 Ill. 2d 28 (2001).

At the same time, however, there are a number of cases holding that an attorney-client relationship cannot be formed without the consent of both the attorney and the client. For example, in *People v. Simms*, 192 Ill. 2d 348, 382, (2000), the Illinois Supreme Court noted that, "The attorney-client relationship is a voluntary, contractual relationship that requires the consent of both the attorney and client." Several cases are in accord. *Willey v. Paulsen*, 384 Ill. App. 3d 305, 311 (1st Dist. 2008) ("The attorney-client relationship is a consensual relationship that forms when the attorney and client both consent to its formation. ... The attorney must indicate an acceptance of authority to work on behalf of the client ..."); *Kehoe v. Salterelli*, 337 Ill. App. 3d 669, 676 (1st Dist. 2003); *Simon v. Wilson*, 291 Ill. App. 3d 495, 509 (1st Dist. 1997); *Torres v. Davis*, 144 Ill. App. 3d 953, 965 (2d Dist. 1986)

These two divergent lines of cases appear to be fundamentally inconsistent. As so often happens, however, they can be reconciled by focusing on the factual context and why the court was addressing whether an attorney-client relationship had been formed. When the issue is whether a putative client's confidences deserve protection, courts are very willing to hold that the attorney's consent to the formation of an attorney-client relationship is not controlling. For example, if a potential client speaks to an attorney who then declines to represent the client, courts will hold that the conversation is protected by the attorney-client privilege.

A different result occurs, however, when the issue is whether an attorney is liable for legal malpractice. In those instances, courts typically require that the attorney have consented to the formation of an attorney-client relationship. Of course, courts are willing to infer the existence of an attorney's consent from conduct, and they do not require an attorney to explicitly consent to represent a client, but they generally require evidence that the attorney agreed to undertake the representation.

Viewed in this light, the two inconsistent lines of cases are logical.

It seems proper that a client's unilateral intent to form an attorney-client relationship is sufficient for the attorney-client privilege to attach to his or her communications. After all, it is not asking much of an attorney to require that a putative client's confidences be protected, even if the attorney never agreed to represent that client.

And, inasmuch as protecting confidences is one of the core values that the conflict of interest rules protect, it also makes sense that an attorney can be disqualified without having agreed to a representation. Nonetheless, it would be unfair to the lawyer to allow a putative client's intent to consult with a lawyer to create a full-scale attorney-client relationship and all of the attendant duties.

Indeed, an attorney should not be liable for failing to give reasonable advice when the attorney has not agreed to give any advice.

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