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When Less Is Not More: Stumbling Into An Accidental Client

Navigating and avoiding the complexities of an unintended attorney-client relationship is an ethical necessity. However, it also presents a real risk. Although primarily regarded as an urban legend among lawyers, the risk is substantial, and occurs sufficiently often to remind lawyers to remain conscious of what they say or don't say to those who solicit them for legal advice. Those solicitations may involve a lawyer "just helping" a friend or family member, or trying to answer a prospective client seeking legal assistance in a business-friendly manner, or engaging in discussions through firm websites or social media posts. Especially in cases of "accidental" or "inadvertent" clients, remember that contrary to the popular saying, less is not always more. This article will focus on potential exposures and best practices to consider to avoid stumbling into an unintended client engagement.

§14 of the Restatement (Third) of the Law Governing Lawyers provides, in part, that an attorney-client relationship is formed when "a person manifests to the lawyer a 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 reasonably should know that the person reasonably relies on the lawyer to provide the services[.]"[1] The vast majority of engagements occur within the first part, wherein prospective clients seek out the services of lawyers, and lawyers agree to take on the client's matter.

Nevertheless, other situations arise in which non-clients or prospective clients seek an attorney for legal services where the attorney fails to effectively decline the representation, or through some action, inadvertently, and sometimes unknowingly, enters into an attorney-client relationship, generating its obligations and liabilities.

Imagine a situation where a lawyer posts a video on social media discussing the state of the law on a hot topic in the news. In response, another social media user, someone completely unknown to the lawyer, posts a comment asking about how the information in the video may apply to her. The lawyer replies by discussing a few general points on the state of the law, but does not say if she is her lawyer, that her response was not legal advice, or that she should contact the lawyer individually, or another lawyer, to discuss in more detail. The non-client takes that information and, in reliance, acts on it. The lawyer has arguably stepped into a relationship where she now owes the social media poster both ethical and liability duties as if she were any other ordinary client, without realizing it or getting paid. Ultimately, a nightmare scenario is created for the lawyer. Or consider a slightly different scenario, where a lawyer is approached by an individual that the lawyer knows in a personal, rather than professional capacity, as another parent during a school event for a child, or an extended family member at a family reunion. During the interaction, the lawyer is asked for his or her views on the situation. In an effort to be friendly and helpful, the lawyer casually offers an assessment, on which the person later relies and acts.

1 Restatement (Third) of the Law Governing Lawyers §14 (2000).

Douglas v. Monroe[2] offers a cautionary tale about the dangers of offering casual legal advice. In *Douglas*, after a college student drowned in a university pool, his family sought legal advice as to potential claims against the university. Because the deceased student's mother was still grieving, her brother pursued those options. He did so by talking to a lawyer he knew in a personal context, as the lawyer was a high school friend.

When the lawyer walked in to the bank where the deceased student's uncle worked as a security guard, they had a brief conversation in which he told her about his nephew's death, that they might seek legal counsel, and asked about any time limits to bring the suit. The lawyer mentioned the applicable statute of limitations, but did not reference a different 180-day period to file tort claims. Nor did she state that he should not rely on her advice. The uncle shared what he had learned with the deceased student's mother. Seven months later, she met with a different lawyer to pursue legal action against the school, when she learned that she was outside the 180-day notice period. The mother subsequently filed a legal malpractice action against the first lawyer, asserting that an attorney-client relationship existed and that she relied on the advice offered. On appeal, the court affirmed summary judgment that no attorney-client relationship existed. The court noted that several factors were important in its determination, including the fact that the uncle, rather than the mother, talked to the lawyer. However, the outcome may have been different had the lawyer offered such casual legal advice to the mother, in the absence of disclaimers about relying on her advice. Equally important is the fact that the lawyer was required to defend against these claims for presumably offering what she thought would be viewed as helpful information rather than formal legal advice.

In a more traditional context, consider the case of *Togstad v. Vesely, Otto, Miller & Keefe*[3]. The lawyer met with a prospective client once but was deemed to have acted negligently and sustained more than $600,000 in damages in an ensuing legal malpractice case. During their one and only meeting, which lasted for forty-five minutes, the prospective client discussed with the lawyer a situation involving both her and her spouse, including seeking counsel to pursue medical malpractice claims emanating from an adverse outcome due to a procedure on her paralyzed spouse.[4] At the conclusion of their meeting, the lawyer told the prospective client that he did not believe that she had a claim based on the facts, but would confer with a colleague and would contact her if the colleague thought otherwise about pursuing a claim.[5]

The parties did not discuss a fee agreement, a need for medical authorizations, or execute an engagement agreement. After later conferring with his colleague but conducting no other independent research, the lawyer concluded again that the prospective client did not have a claim to pursue, and did not share that with the prospective client nor communicate with her again.[6] One year later, the prospective client consulted with another lawyer, wherein she learned, for the first time, that she probably had claims to pursue, but that the statute of limitations on those claims had elapsed in the intervening time between speaking to the first lawyer and her meeting with the second. She later pursued legal malpractice claims against the first lawyer, in which she stated that she relied on the lawyer's advice in not pursuing her claims.[7] The Minnesota Supreme Court affirmed the jury's negligence findings and damages against the lawyer. In its opinion, the court held that, notwithstanding the brief nature of the meeting and that no formal engagement had been entered, an attorney-client relationship nonetheless existed.[8] The court specifically determined that "a jury could properly find that [the prospective client] sought and received legal advice from [the lawyer] under circumstances which made it reasonably foreseeable to [the lawyer] that [the prospective client] would be injured if the advice were negligently given."[9]

The Dangers and Obligations Created by Accidental Clients

Confidentiality and privilege implications

Notably, the inadvertent creation of an attorney-client relationship creates confidentiality and privilege implications for the lawyer. In the event that the lawyer is involved in such an engagement, it should be recalled that under American Bar Association ("ABA") Model Rule 1.6[10], information related to the representation must be treated as confidential and must be accorded the same protections as any other client. In other words, as with any other attorney-client relationship, even when unintended, the lawyer is now subject to the same confidentiality implications such that any information learned that relates to the representation of the "client" is now protected from disclosure absent one of the Model Rule 1.6(b)[11] exceptions and/or client consent. This obligation also is imposed regarding the application of the attorney-client privilege, as lawyers also must protect from disclosure communications meeting the privilege threshold. Any disclosure of privileged materials may create more consequences for the client and additional avenues of exposure for the lawyer.

2 743 N.E.2d 1181 (Ind. Ct. App. 2001).
3 *Togstad v Vesley, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).
4 *Id.* at 690
5 *Id.*
6 *Id.* at 691.
7 *Id.* at 690.
8 *Id.* at 693.
9 *Id.*
10 Rule 1.6 of the ABA Model Rules of Professional Conduct.
11 *Id.*

Conflicts of Interest

Conflicts of interest also are present in these types of entanglements. A lawyer who unintentionally and unknowingly enters into an attorney-client relationship encounters the risk that representation of that client will result in disqualification from representing other current or future clients. In addition, such representation may create personal conflicts of interest based upon the amount and type of information learned from the unintended client. A lawyer who has entered into this type of engagement may not have properly collected or input the requisite information into the conflicts checking system. Thus, the existence of a conflict may not be recognized until it's too late, resulting in subsequent litigation, possible disqualification, disgorgement of fees, disciplinary inquiries, and of course, lost business, among other consequences.

Competence and Communication

As observed in the *Togstad* case, competence and communication played a major part in the court's determination of both the existence at an attorney-client relationship, as well as the liability and damages against the lawyer. The lawyer in question did not regularly practice in the medical malpractice field, and the testimony cited by the court called into question whether this fact was explained to the prospective client. However, in affirming the judgment, the court held that the lawyer should be held to the same level of competence regardless of his regular practice area due to the advice he offered the prospective client. Moreover, he failed to meet that standard in offering a negligent opinion, failing to conduct any independent research, and failing to advise the prospective client of the applicable two-year statute of limitations. The cautionary lesson here requires that lawyers sufficiently qualify their discussions with prospective clients, and any limitations on their ability or desire to take on clients matters. In addition, if a lawyer indicates that more information will be provided to a prospective client at a later date, then such information must be provided, including written documentation to avoid any confusion about the lawyer and future roles and duties of both the lawyer and the prospective client.

Malpractice Liability and Disciplinary Implications

As observed in *Douglas*, and in the hypothetical example of the attorney responding to viewers of her social media posts, attorneys who become involved in these types of engagements may encounter the risk of malpractice claims. If the advice was negligently provided, or failed to fulfill the requisite standard of care, even if not formally engaged, liability may attach as a result of their action or inaction on the accidental client's matter. Based upon that negligence, lawyers may thereby incur any resulting damages. Lawyers also may become the subject of disciplinary proceedings if they acted incompetently or failed to sufficiently communicate with a prospective client who believed they entered into an attorney-client relationship with the lawyer.

Tips for Avoiding an Inadvertent or Accidental Client

Do not offer specific legal advice without first completing a conflicts check and formally engaging the client. In the website and social media arenas, the risk becomes more acute where the ability to easily communicate with and respond to online users creates a slippery slope to offering express legal advice. In this environment, the impression is created in the user's mind that the lawyer represents the individual.

Do not permit prospective clients or non-clients to provide unlimited amounts of information about their matters without first conducting a conflicts check. Receiving too much information will create issues down the road, including potential conflicts of interest, if not limited and handled properly at the outset. Restrict the information you receive before conducting a conflicts check and formally engaging, and maintain a process in which prospective clients' limited information is retained for future conflicts checks. Remember that under Model Rule 1.18[12], former prospective clients are treated as former clients with respect to protecting and using their information.

Do not offer unsolicited legal advice. When a court later analyzes the client's reasonable belief in the existence of an attorney-client relationship and subsequent reliance on that advice, unsolicited advice will become a significant factor.

Speak up when the need arises to clarify your role and that you are *not* a party's attorney. This axiom is true for both prospective clients and unrepresented parties (Model Rule 4.3[13]). Clarify that any information you offer is not and should not be viewed as legal advice. Further, if you inform a prospective client that you will follow up or confer with the prospective at a later date to discuss further engagement, confirm this approach in writing with an "Awaiting Further Action" letter and follow through with the prospective client. A sample "Awaiting Further Action" letter can be found in our Lawyers Toolkit 5.0.

Choose your words carefully when speaking to a prospective client. Whether or not a lawyer decides to formally engage a prospective client after a consultation, or believes that time is needed to review and assess before formally engaging, certain procedures must be followed. The lawyer should clearly inform the prospective client what actions will be taken, if any, and whether or not they should expect to hear more on a formal decision to retain or decline representation. From a liability perspective, when analyzing whether one's belief is in the existence of an attorney-client relationship was reasonable, a lawyer informing a prospective client that a claim probably should not be pursued is vastly different from informing a client that the firm will not be representing the prospective client, and other counsel should be sought.

12 Rule 1.18 of the ABA Model Rules of Professional Conduct.
13 Rule 4.3 of the ABA Model Rules of Professional Conduct.

Include disclaimers on your firm website, social media accounts, and social media posts. Although not solely dispositive of the existence of an attorney-client relationship, disclaimers that information received both through a firm's website, as well as social media posts or accounts, are not to be taken as legal advice, disclaimers will provide additional documentation in determining a reasonable belief when the existence of a relationship is in dispute in future claims. Find more tips on using law firm website disclaimers, see our Professional Counsel publication titled "Law Firm Website Woes: Educating and Disclaiming Prospective Clients."

Send a non-engagement letter. Equally important as a written engagement letter when engaging an intended client, so too is the non-engagement letter when declining to take on a prospective client's matter. Although a lawyer may believe that his or her role has been clarified in not accepting the prospective client's matter, additional actions should be implemented by written documentation of the non-engagement. Such documentation substantiates your role and that the prospective client has been informed that the lawyer will not be engaging or representing the prospective client in the specified matter. When formally engaging, even when not required, best practice requires execution, with your client countersigning a formal engagement agreement. For more tips on declining representation with prospective clients, please see our Professional Counsel publication titled "It's Not Goodbye, Just Until We Meet Again: Declining Representation with Prospective Clients." Sample engagement and non-engagement letters can be found in our Lawyers Toolkit 5.0.

Conclusion

As referenced earlier, in the case of accidental clients, and even completely intended clients, less is *not* more. In these situations, be clear and concise. Detail your role, by specifying the limitations, avoid vagueness and ambiguity, and capture it in writing. Even if you believe that you clearly declined to take a prospective client's matter, or did not provide specific legal advice to someone who sought this counsel, clearly reflect your non-engagement in writing. In addition, clarifying your role and qualified information will help in mitigating the potential risk of an accidental client down the road.

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