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Defining Attorney-Client Relationships In The Electronic Age

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The journalist James Surowiecki wrote a few years back, “Technology is supposed to make our lives easier, allowing us to do things more quickly and efficiently. But too often it seems to make things harder, leaving us with 50-button remote controls, digital cameras with hundreds of mysterious features and book-length manuals, and cars with dashboard systems worthy of the space shuttle.”[1] As technology has advanced, the ways in which attorneys communicate with clients, potential clients, former clients and the public have created new and ill-defined issues relating to whether an attorney-client relationship exists. This article will address some of the issues related to beginning and ending the attorney-client relationship that have evolved into an often nebulous yet hazardous concept in the

new electronic age in which we live.

So why does this matter? In short, it matters because an individual may infer an attorney-client relationship exists and rely upon that belief for either asserting the attorney-client privilege, acting or not acting on an attorney's advice, or creating a fiduciary duty for the attorney which could lead to malpractice issues. The Restatement (Third) of the Law Governing Lawyers, Section 14, defines the formation of the attorney-client relationship as follows: "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 reasonably should know that the person reasonably relies on the lawyer to provide the services."[2] This is a baseline definition, which essentially points out that an attorney-client relationship could form either by consent of both parties or under an estoppel theory.

In order to understand how the attorney-client relationship functions, it may help to view the subject as it affects the attorney-client privilege. For an attorney-client privilege to be raised, an attorney-client relationship must have been established. The attorney-client privilege itself helps to define when an individual becomes a "client." The client is generally defined as the intended and immediate beneficiary of the lawyer's services. "To be considered a client for the purposes of invoking the attorney-client privilege two conditions must be met: (1) the client must communicate with the attorney to obtain legal advice, and (2) the client must interact with the attorney to advance the client's own interests."[3]

So who is a client? The following scenarios may meet the above definition: When an individual enters information on a communications form on a law firm website, and then receives a response, is she a client? When a law firm sends out monthly email communications containing legal advice, is the recipient a client? If an attorney posts some legal advice quip on Twitter and someone responds, are they a client? If a law group has a YouTube ad or video conveying legal information, is the viewer a client? If a legal blog written by an attorney contains general advice, and a reader relies on the advice and reaches out to the attorney, is the reader a client? When an attorney replies quickly to an inquisitive email, is the recipient a client? There are limitless scenarios such as these where some recently developed form of communication presents a problem whether a client is indeed a client, and whether an attorney-client relationship has formed.

Often the attorney has a different idea regarding when the representation has actually commenced, as compared to the layperson. It has been well-established that there is no need for a written contract or a payment of a fee to begin a relationship (although that may be ideal). A common example that has likely been around as long as lawyers have existed occurs when there is a social event and someone hears there is a lawyer attending, and inevitably the attorney is asked a legal question, to which the attorney offers an off-the-cuff response. The attorney almost certainly believes no relationship has commenced, but what about the layperson seeking advice? A brief look at a Minnesota case sheds light on this issue. In Togstad v. Vesely, Otto, Miller & Keefe, Joan Togstad, the wife of a patient who suffered a stroke, met with an attorney, Jerre Miller, to discuss her husband's case.[4] They discussed what had occurred for 45 minutes or so, and at the end Miller told her that "he did not think [they] had a legal case," but that he would discuss it with his partner and he would call if he changed his mind.[5] No communications ensued, but when Mrs. Togstad went to another lawyer to discuss her case a year later, the statute of limitations had run and she in turn sued Miller.[6] The jury ultimately found that an attorney-client relationship existed and Miller was liable for $650,000.[7] Although not all jurisdictions would have ruled the same, this has become a cautionary tale for attorneys everywhere.

It is imperative for attorneys to delineate clearly when a relationship has formed and when it has ended. Although this challenge has always existed for lawyers, the electronic age has exacerbated the issue. Technology, especially the way in which we communicate, has created a double-edged sword. It is easier, faster and more efficient to reach out to potential clients, clients and past clients, but as we utilize these new forms of communication it is easier for a layperson to believe an attorney-client relationship exists. As you may already know, an attorney-client relationship can be created through chat rooms, email, social networks and other online communications, and not just in person or over the phone.[8] An attorney must take certain measures and perform "best practices" to ensure that these electronic forms of communication clearly convey and express their intentions.

The single most important word here is "DISCLAIMER!" This is the first line of defense, and is not just a "best practice," but rather a "must practice." An attorney should constantly use disclaimers in their cyber communications.[9] Indeed an Arizona ethical opinion has stated in regard to a website, "the use of appropriate disclaimers with a website may be essential to prevent unsolicited e-mail from being treated as confidential."[10] Also, it is acceptable within the disclaimer to use express language, such as stating that an attorney-client relationship is not being formed. Just because a disclaimer is used, however, does not

mean that a liability shield is automatically created. If the conduct or advice expressed within an online communication is inconsistent with the disclaimer, if the disclaimer is overused (boilerplate), or if the disclaimer is inadequately written, it may be overlooked or an inadequate measure. Catherine Lanctot, a professor at Villanova University Law School stated, “Even in the face of elaborate written disclaimers, courts may well find it reasonable for laypeople to treat such disclaimers as nothing more than ‘legalese,’ particularly if the conduct of the attorney is inconsistent with the disclaimer.”[11] Similarly, think again about Togstad, where Miller expressly stated that he did not think the alleged client had a sound claim of medical malpractice, and yet an attorney-client relationship was still determined to have been formed. A disclaimer is the first step, but there are more best practices to incorporate to better ensure that your intentions are understood by the public.

Avoid giving specific legal advice in online communications (unless of course forming or continuing an attorney-client relationship is the lawyer’s intention). Specific legal advice to further a client’s specific inquiry is the kryptonite to a perfectly written disclaimer. Specific legal advice forms an agreement between an attorney and his or her client based on a particular legal matter the client is experiencing.[12] In other words, specific advice leads to a belief that an attorney-client relationship has begun. Since the first part of the 20th century, giving specific legal advice has been generally banned nationwide in newspapers, radio shows, and through the television.[13] Although many states have yet to address this same issue with regard to the internet, it would be wise to follow the same historical trend, and simply avoid giving specific legal advice in the latest mediums. This must not be confused with giving general legal information, or even generalized advice over the internet, which is perfectly acceptable. Jurisdictions vary in their definition of legal advice versus generalized information, but the ABA’s Best Practice Guidelines for Legal Information Web Site Providers defines specific advice as: “recommendations tailored to the unique facts of a particular person’s circumstances,” not general or static legal knowledge.[14] If a question arises whether information constitutes specific legal advice or generalized advice, it is likely best to simply avoid posting that information altogether. Do not tread a fine line.

Similarly, be extremely careful or avoid discussing actual cases online. This notion should go without saying, but it is worth repeating, as this will put the lawyer on a fast-track to ethical violations. All it takes is one careless Facebook or Twitter post to put the lawyer in hot water. One recent example of how a thoughtless Facebook post created a substantial issue occurred in the Florida case, Snay v. Gulliver Schools.[15] Gulliver Schools did not renew Mr. Snay’s contract and was then sued by Mr. Snay for age discrimination.[16] The

parties reached a settlement that included a confidentiality clause requiring the terms of the agreement to be kept strictly confidential.[17] Days after the settlement, Mr. Snay's college-aged daughter posted to Facebook, "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."[18] This message was found by the Florida Court of Appeals to violate the nondisclosure clause of the settlement, and $80,000 of Mr. Snay's $90,000 settlement was disgorged.[19] Although the attorney in this anecdote did nothing wrong, this is a strong example of how a thoughtless post can cause unthought-of consequences. An additional important reminder here is to advise clients to be careful what they post online.

Another essential best practice is to avoid the temptation to give a quick, off-the-cuff response to an online communication (or any communication as well). When answering questions over the internet, whatever a lawyer writes should be thought of as being permanent. Something said over the phone or in person likely will not be set in stone. Therein lies the major difference. You must take the time to fully analyze and write (and spell-check) your online communications to ensure it is something you can live with forever. Also, take the time to make sure no specific legal advice is included in your response unless you intend to form an attorney-client relationship.

It is also a best practice, after contact has already been initiated, to expressly advise the potential client or client in writing, that unless the client has a signed retainer letter or agreement from the attorney, the attorney-client relationship should not be construed as having been established or re-established. An example that takes place frequently in the realm of personal injury law occurs when an initial conversation with a potential client transpires and the case is then turned down with an included written letter advising the potential client generally that a statute of limitations exists, and that the client needs to seek counsel immediately or the case could be lost (as well as the statement advised above, that no relationship is formed without a signed retainer letter or agreement). Frequently, that same person will contact the attorney again after some time passes, and present some newly discovered information. As long as that previously written letter still exists, stating that there is no relationship without a signed retainer letter, then the attorney may feel confident and safe that whatever subsequent conversations take place, or whatever is later written in online communications, should not be interpreted as establishing or re-establishing an attorney-client relationship. This step is another simple, yet effective measure to take in order to dictate to the potential client or former client how and when the attorney-client relationship will be formed.

Most of this article up to this point has focused on the formation of an attorney-client relationship, and now the focus will switch to the termination of an attorney-client relationship. Much of the previous discussion is also applicable to the termination of an attorney-client relationship.

So, what occurs if the lawyer has ended the attorney-client relationship, but wants to "sustain" and keep in touch through email blasts, newsletters or social media posts? Does this create a reasonable belief in the client that you are still representing them? A best practice — even outside the realm of online communications — is to send a termination or disengagement letter at the end of representation or at the end of a matter. Within the letter, the lawyer can include an explicit and express language that addresses the questions above. When terminating a client-attorney relationship, the client should not leave with any doubts as to the status of the relationship.

Again, to reiterate, disclaimers are still the first line of defense. A disclaimer should be included within online posts, and email marketing, and should contain conspicuous language clarifying the intention of posts or emails. These precautions can help end any confusion a former client may have upon receiving online communications.

In conclusion, technological advances have created great advancements in the way attorney's can reach clients, potential clients and former clients, and it is an attorney's responsibility to ensure that there is no ambiguity in regard to the status of an attorney-client relationship.

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[1] James Surowiecki, Feature Creep, The New Yorker, May, 28, 2007, http://www.newyorker.com/magazine/2007 / 05/28/feature-presentation.

[2] Restatement (Third) of the Law Governing Lawyers § 14 (2000)

[3] Protecting Confidential Legal Information: A Handbook For Analyzing Issues Under The Attorney-Client Privilege And The Work Product Doctrine, SM090 ALI-ABA 481 , 491.

[4] Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

[5] Id.

[6] Id.

[7] Id.

[8] Sophia Rios, Lead Generation for BigLaw? The Business and Ethics of Providing Free Legal Tools and Information online, April 1, 2015, https://law.stanford.edu/2015/04/01/lead-generation-biglaw-business-ethics-providing-free-legal-tools-information-online/

[9] See also Stephanie F. Ward, Top 10 Ethics Traps, Nov. 1, 2007, 8:19 PM, http://www.abajournal.com/magazine/ article/top_10_ethics_traps (where a law firm in Massachusetts maintained a website with a link to email lawyers directly without any disclaimers, and a conflict occurred when a company emailed the firm with confidential information; the law firm lost two clients as a result).

[10] State Bar of Ariz. Comm. On Rules of Prof'l Conduct, Op. 02-04 (2002).

[11] Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 193 (1999).

[12] http://hirealawyer.findlaw.com/do-you-need-a-lawyer/what-is-legal-advice.html

[13] Lanctot, 49 Duke L.J. at 218-229.

[14] Sophia Rios, Lead Generation for BigLaw? The Business and Ethics of Providing Free Legal Tools and Information online, April 1, 2015, https://law.stanford.edu/2015/04/01/lead-generation-biglaw-business-ethics-providing-free-legal-tools-information-online/ (quoting ABA Law Practice Division, Best Practice Guidelines for Legal Information Web Site Providers, ABA, Feb 10, 2003, http://www.americanbar.org/groups/law_practice/committees/elawyering-best-practices.html).

[15] Gulliver Sch., Inc. v. Snay, 137 So. 3d 1045 (Fla. Dist. Ct. App. 2014).

[16] Id.

[17] Id.

[18] Id.

[19] Id.