

# The Inadvertent Lawyer: Beginning and Ending an Attorney-Client Relationship in the Electronic Age

Wednesday, March 29, 2017

Presented By the IADC Professional Liability Committee and Technology Committee

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# THE INADVERTENT LAWYER: TOPICS

WHAT IS THE LAW?

THE ATTORNEY-CLIENT  
RELATIONSHIP

BEST PRACTICES



WHAT IS THE LAW?

# OVERVIEW

WHAT IS THE LAW?

- ABA Model Rules
- Ethical Opinions
- Case Law
- Research





# ABA MODEL RULES OF PROFESSIONAL CONDUCT

- Model Rule 1.1
  - A lawyer must “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .”



## ETHICAL OPINIONS

- ABA Formal Opinion 10-457 – **Websites**
  - Lawyers must be mindful of any **expectations** created by website.
  - Lawyers must carefully **manage inquiries** invited through a website.
  - Websites must not include **misleading** information.

## ETHICAL OPINIONS

- CA Opinion 2004-166 – Chat Rooms/Solicitation
  - An attorney's communication with prospective clients in a mass disaster Internet chat room **violates** CA Rules of Prof. Conduct.

## ETHICAL OPINIONS

- AZ Op. 02-04 - Email
  - Attorneys owe no duty of confidentiality to those who **unilaterally** e-mail the attorney when it is unsolicited.
  - However, law firm websites, with e-mail addresses, **must** include **disclaimers** regarding whether e-mails from prospective clients will be treated as confidential.



# CASE LAW

WHAT IS THE LAW?

- Ex. *Togstad v. Vesely et al.*, 291 N.W.2d 686 (Minn. 1980).
  - Potential client met for close to an hour
  - Attorney stated “he did not think they had a legal case,” but he would discuss it with his partner and call if he changed his mind
  - SOL ran; determined attorney-client relationship formed, attorney liable for \$650,000.



# CASE LAW

WHAT IS THE LAW?

- Ex. Snay v. Gulliver School
  - Confidential Settlement reached between ex-employee and company for age discrimination for \$90,000
  - Ex-Employee's daughter posted on facebook terms of settlement
  - Court ordered ex-employee to disgorge 90% of settlement proceeds



# RESTATEMENT, THIRD, THE LAW GOVERNING LAWYERS

## SECTION 14

- A relationship of client and attorney arises when:
  - (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the client; and either
    - (a) the lawyer manifests consent to do so; or
    - (b) the lawyer knows or should reasonably know that the person reasonably relies on the lawyer to provide services

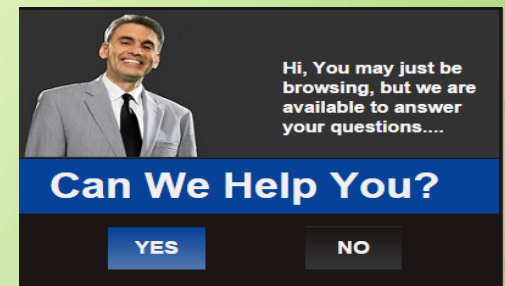


# THE ATTORNEY-CLIENT RELATIONSHIP



## WHEN IS THE ATTORNEY-CLIENT RELATIONSHIP CREATED?

- Attorneys navigating the online space need to consider the line between legal **advice** and legal **information**. Once any attorney begins giving legal advice, concerns arise regarding the creation of an attorney-client relationship.
- “Legal Advice” is defined by the ABA as “recommendations tailored to the unique facts of a particular person’s circumstances,” not general or static legal knowledge.



## KEY CONSIDERATIONS FOR ONLINE ACTIVITIES

- An attorney-client relationship could be inadvertently formed if a client “**reasonably relies**” on what they **believe** to be the attorney’s legal advice through social media.
- **Model Rule 1.18** provides that “a person who discusses with a lawyer the possibility of forming a attorney-client relationship with respect to a matter is a prospective client.” This initiates related ethical concerns of confidentiality.
- When using social media, attorneys should not only speak in **generalized terms**, but also post explicit **disclaimers** stating that any interaction does not form an attorney-client relationship in order to inform the user and ultimately rebut any reasonable belief that one exists.

## UNSOLICITED EMAILS

- Unsolicited emails from individuals containing confidential information to attorneys do not form an inadvertent attorney-client relationship or rise to the level of establishing that individual as a potential client as long as adequate disclaimers are in place.
- The revised comments to Model Rule 1.18, states: “[s]uch a person communicates information **unilaterally** to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship, and is thus not a “prospective client.””

## BLOGS

- There are real concerns related to blogging and the potential creation of an attorney-client relationship when the reader is allowed to reply to the posts of the attorney-author.
- This interaction can lead to expectations of a relationship being formed.
- Lawyers should either not include a comment section on their blogs or keep the discussions informal and include a **disclaimer** on the blog.

## THE ATTORNEY-CLIENT RELATIONSHIP

The most important defense to the inadvertent creation of an attorney-client relationship is a **DISCLAIMER**. Cal Watson will provide a more in-depth analysis on “best practices” and the contents of disclaimers

The background is a dark green gradient. In the four corners, there are decorative white circuit-like patterns consisting of lines and small circles, resembling a PCB layout. A large, empty rectangular box with a thin orange border is centered on the page.

# BEST PRACTICES

# DISCLAIM, DISCLAIM, DISCLAIM!

## Caveats . . .

- If you disclaim, you cannot accept money!
- Avoid boilerplate and inconspicuous disclaimers.
- Use clearly written and easily understandable language.

## EXAMPLE DISCLAIMERS:

- *“Use of this website, including sending or receiving information through it, does not establish an attorney-client relationship. An attorney-client relationship with Law Firm is established only by an express written agreement signed by Law Firm to represent you.”*
- *“Following Law Firm on social channels, including Twitter, Google Plus, LinkedIn, Instagram and Facebook does not state or imply a relationship between Law Firm and the follower. An attorney-client relationship with Law Firm is established only by an express written agreement signed by Law Firm to represent you.”*



## EXAMPLE DISCLAIMERS:

- *“This blog is made available for general educational purposes and is intended not to provide any reader with specific legal advice. By using this blog site, no attorney client relationship is created between you and the publisher of the blog. The blog should not be used as a substitute for legal advice from a licensed professional attorney in your state who consults with you about the specific facts of your matter.”*
- *“This blog includes information about legal issues and legal developments. Such materials are for informational purposes only and may not reflect the most current legal developments. These informational materials are not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. You should contact an attorney for advice on specific legal problems.”*

# “INFORMAL” DISCLAIMERS

DISCLAIM ATTORNEY CLIENT RELATIONSHIP INFORMALLY IF A FORMAL DISCLAIMER IS NOT PRACTICAL.

- TWITTER
- TEXT MESSAGE
- FACEBOOK MESSAGES
- LINKEDIN MESSAGING

DISCLAIMERS DO **NOT** PROVIDE ABSOLUTE PROTECTION.

Even with disclaimers, be **careful** about your content:

- Don't give legal advice. Think: "**general legal information.**"
- Beware of **specific questions** or **individual communications.**
- Keep it **general**, both in content and audience:
  - "Depending on the specific circumstances . . ."
  - "Generally speaking . . .", etc.

## END OF ENGAGEMENT LETTERS

- At the end of an engagement, **terminate** the client-attorney relationship, leaving **no doubts** as to the status of the relationship.
- Although the engagement has ended, **anticipate future contact** by client newsletter, holiday cards, e-blasts, and social media and address in your end of engagement letter.
- **Example:**

Please allow this letter to confirm that this firm's representation of you has concluded for the above-referenced matter. While we may send you information and updates from time to time, these communications do not reestablish an attorney-client relationship. Any future engagement with this firm must be confirmed in writing.

REMEMBER THAT OTHER  
**RULES OF PROFESSIONAL CONDUCT** MAY APPLY.

1. Advertising
  - Model Rules 7.1, and 7.2
2. Solicitation
  - Model Rule 7.3
3. Conflict of Interest
  - Model Rules 1.7, 1.8, 1.9, and 1.10
4. Confidentiality
  - Model Rule 1.6

## EDUCATE OTHER ATTORNEYS IN YOUR LAW FIRM

- TREAT **CYBERSPACE** THE SAME AS A **LIVE MEETING**
  - EXPLAIN THE DISTINCTION BETWEEN PROVIDING GENERAL LEGAL **INFORMATION** AND GIVING LEGAL **ADVICE**. LINES EASILY BLUR IN CYBERSPACE!
    - ALWAYS MAKE SURE A **DISCLAIMER** IS IN PLACE!

THANK YOU.



ZARWIN ♦ BAUM ♦ DEVITO  
KAPLAN ♦ SCHAER ♦ TODDY ♦ P.C.  
ATTORNEYS AT LAW



THE INADVERTENT LAWYER:

BEGINNING AND ENDING AN  
ATTORNEY-CLIENT RELATIONSHIP IN THE ELECTRONIC AGE

# RESOURCES

## THE ATTORNEY-CLIENT RELATIONSHIP

- The New York Bar Association provides a comprehensive guide to social media use: <http://www.nysba.org/socialmediaguidelines/>
- This publication is helpful relating to attorney blogs: <http://dri.org/docs/default-source/dri-online/course-materials/2013/professional-liability/09-navigate-your-way-through-the-ethics-bog-of-attorney-blogs.pdf?sfvrsn=4>
- This publications highlights key issues relating ethics and the use of social media: [http://www.americanbar.org/publications/blt/2014/01/03\\_harvey.html](http://www.americanbar.org/publications/blt/2014/01/03_harvey.html)



# RESOURCES

## BEST PRACTICES

- ABA Formal Opinion 10-457
- New York City Ethics Op. 1998-2 (1998) (use of a “disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications”)
- Utah State Bar Ethics Op. 96-12 (1997) (“if legal advice is sought from an attorney, if the advice sought is pertinent to the attorney’s profession, and if the attorney gives the advice for which fees will be charged, an attorney-client relationship is created that cannot be disclaimed by the attorney giving the advice.”)

# Questions for Presenters?



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## Thank you for Participating!

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