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LEGAL ETHICS

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The Cocktail Party Phenomenon

*A casual conversation can lead to ‘accidental representation’
— and some uncomfortable problems*

By **WENDY PATRICK MAZZARELLA**

Oh, you’re a lawyer? Great! I have a question . . .” One minute, you’re just another stranger elbowing your way to the cocktail sandwiches and mini-quiche, and the next, you’re someone’s new best friend and counselor. And it’s not just at cocktail parties that lawyers experience this phenomenon. Attorneys who spend a lot of time in the courthouse have all been approached by ordinary folks, lost in what to them is a foreign world, who are drawn to anyone with a suit and a briefcase for answers to their questions.

Sometimes they just want to know how to get to Department 35. Frequently, however, they are seeking some free legal help with whatever legal problem brought them there in the first place.

The attorney-client relationship ideally should be formed deliberately, with full knowledge and intention of both the client and the lawyer. Unfortunately, however, attorneys can sometimes inadvertently, through words or conduct or both, end up leading a potential client to believe they are communicating with the lawyer in confidence, when the lawyer has no intention of forming a legal relationship. This unintentional creation of a legal relationship, especially one without much information upon which to base advice, not only gives rise to potential malpractice exposure, but also may cause the attorney to be conflicted out of representing the paying client on the other side of the case should the opportunity arise.

Forming the relationship in a non-traditional setting

California Evidence Code §950 defines “lawyer” for purpose of the attorney-client privilege as either a person authorized to practice law, or a person “reasonably believed” by the client to be so authorized. A client is defined in §951 as “a person who, directly or through an authorized representative consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.”

“Confidential communication between client and lawyer” is defined in §952 as “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”

Consider the potentially different outcomes when a tipsy partygoer decides to lay out the facts of her daughter’s drunk driving case to someone who was just introduced to her as a lawyer right in front of a crowd of people at a party, versus the discreet reveler who asks the lawyer to please step into the other room so they may talk privately. If the lawyer goes with the guest to listen to his case, she may have effectively led the guest to believe they were speaking in confidence. Another bad situation for the lawyer is when a well-meaning party host deliberately brings over a guest for the specific purpose of a legal conversation. What does the lawyer do? Caught in an awkward position, often just smile politely and listen. And then sometimes even after explaining that he or she “doesn’t do that type of work,” or “doesn’t have private clients,” the lawyer may end up answering some general questions as the undaunted party guest continues to discuss his case.

Unfortunately, the answers to such general questions may not include advice regarding potentially critical issues such as a running statute of limitations, which is a commonly raised complaint when someone has discussed their case with a lawyer who ended up not representing them.

And regarding the online potential client, note that despite containing what one might otherwise consider confidential information, unsolicited e-mail, just like an unsolicited detailed message on an answering machine, normally will not constitute a confidential communication between lawyer and client. San Diego County Bar Assn. Legal Ethics Committee Opinion 2006-1[sdcba.org/ethics/ethicsopinion06-1.htm].

California Formal Opinion 2003-161

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2003-161 examines under what circumstances a communication made in a non-office setting by a person seeking legal advice may be entitled to protection as a confidential communication when the lawyer makes no agreements of confidentiality and does not accept the case. The opinion concludes that the communication may be entitled to protection under two circumstances:

1. if an attorney-client relationship is created by the contact or
2. even if no attorney-client relationship is formed, the attorney’s words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in

confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.

The opinion points out that attorney-client relationships are formed by contracts, whether express or implied. In the examples cited above, casual conversation initiated by strangers where the lawyer declines representation does not form an express contractual relationship. In determining whether an implied contract is formed, several factors must be considered. These factors include: whether the lawyer agreed to look into the matter, provided legal advice and/or was consulted in confidence, and whether the individual seeking advice “reasonably believes that he or she is consulting a lawyer in a professional capacity.” (citations)

Even if no attorney-client relationship is formed, depending on the circumstances, the lawyer may have a duty to keep the information confidential. The opinion first examines whether the person seeking advice is a “client” for purposes of the privilege, and concludes that the critical factor in determining this issue is the conduct of the attorney.

The next question is whether the communication is confidential. The opinion lists four factors to consider:

- the presence of non-essential people who can hear the communication;
- the reason the person is speaking to the attorney;
- the actions taken by the attorney to advise the speaker that the information is not confidential; and
- the extent to which the information is public knowledge or of a sensitive nature to the speaker.

The opinion notes that the attorney-client privilege is an evidentiary privilege (citing Cal. Evid. Code §§952-955) that “permits the holder of the privilege to prevent testimony, including testimony by the attorney, as to communications that are subject to the privilege.” It explains that California Business and Professions Code §6068(e) is broader than the attorney-client privilege because it covers all information acquired during the course of the professional relationship “that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client.” (citations) The opinion concludes that an attorney may owe a duty of confidentiality under Cal. Bus. and Prof. Code §6068(e) and CRPC 3-310(E) to persons who never actually become clients.

Avoiding representation of adverse interests

If an attorney, even through implied contract, has acquired a duty to keep a speaker’s information confidential, Rule 3-310(E) may preclude the attorney from representing any other parties in the matter at issue.

CRPC 3-310(E) provides that “a member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.”

ABA Model Rule 1.18, Duties to Prospective Client

There is no specific “prospective client” rule found in the California Rules of Professional Conduct. When the California rules are silent on a particular issue, we can look to the ABA Model Rules for ethical guidance, although they are not binding. ABA Rule 1.18, however, defines a “prospective client” in subsection (a) as “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.”

Even when no client-lawyer relationship results, however, subsection (b) provides that “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”

Subsection (c) states in pertinent part that a lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d) (regarding issues including consent and screening).

Comment [2] explains that not everyone who communicates information to a lawyer is protected under Rule 1.18. “A person who 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, is not a ‘prospective client’ within the meaning of paragraph (a).”

It has been observed that similar to former clients, prospective clients are entitled to “slightly less” confidentiality than current clients. (ABA Annotated Model Rules of Professional Conduct 5th ed., at 287.) The mere sharing of information does not automatically lead to disqualification of the lawyer. Obviously, a lawyer must receive enough preliminary information to decide whether or not to consider representation in the first place. Along these lines, Rule 1.18 (c) requires the information be “significantly harmful” to the prospective client before disqualification can become an issue.

Are you still on the hook?

Many attorneys have found themselves in the uncomfortable and often awkward situation of having a personal friend approach them with a legal problem and ask for their advice or representation. Many lawyers decline representation under these circumstances, rather than take on such a difficult representation that could also possibly jeopardize the

friendship. After letting a friend down, however, some attorneys feel compelled to answer some follow-up questions. The case of *People v. Gionis* sheds some light on some of the issues involved in this dilemma and their resolution.

In *People v. Gionis* (1995) 9 Cal.4th 1196, the California Supreme Court found that the attorney-client relationship did not extend to cover statements made after an attorney has explicitly refused to represent the speaker; such refusal would preclude the speaker from having a reasonable expectation that they are represented by the attorney.

In *Gionis*, the defendant Thomas Gionis' ex-wife Aissa Marie Wayne and a male friend were violently assaulted by two men. Defendant, who was engaged in a bitter custody dispute with Wayne, was arrested in connection with the assault, subsequently convicted, and sentenced to five years in prison. (*Gionis*, 9 Cal.4th at 1201-02.)

One of the prosecution witnesses was John Lueck, an attorney who had often referred business to Gionis, who was a doctor. (*Id.* at 1201-03.) Lueck testified that defendant Gionis had told him that his ex-wife "had no idea how easy it would be for defendant to hire someone to 'really take care of her,' and that if defendant were to do something, he would wait until an opportune time to act in order to avoid suspicion." (*Id.* at 1201-02.)

The Court found the statements at issue were not protected by the attorney-client privilege.

This case presents an interesting analysis because although Lueck explicitly refused to represent Gionis, their relationship during the time period in question included some legal discussion and even a subsequent emergency court appearance.

Legal representation v. lending an ear

When Gionis was served with divorce papers, he called Lueck because he was very upset and needed someone to talk to. Lueck agreed to meet with Gionis at Gionis' home only after making it clear that he would not represent Gionis in the divorce because he knew both him and Wayne. (*Id.* at 1203.)

As a friend, Lueck agreed with Gionis that a change of venue from Orange County to Los Angeles County might be a good idea, because Wayne was the daughter of the famous John Wayne, for whom the Orange County airport was named. Lueck, however, did not offer to get involved with the change of venue and told Gionis he should retain a good attorney immediately.

After Gionis made some incriminating statements, Lueck pointed out that Gionis would be the main suspect if something happened to Wayne during the dissolution. (*Id.* at 1203-04.)

The timing of the statements

In this case, Gionis' incriminating statements were made after Lueck explicitly told Gionis that he would not represent him. Finding a lack of California case law on the issue, the Court looked to other jurisdictions and was persuaded by their consistent holdings that statements made after an attorney has refused employment are not protected by the attorney-client privilege. (*Id.* at 1211.) Recognizing that the California Evidence Code may not require a hard and fast rule providing that any statement made after an attorney declines representation is not covered by the privilege as a matter of law, the Court found that "a person could have no reasonable expectation of being represented by an attorney after the attorney's explicit refusal to undertake representation." (*Id.*)

Is any "legal work" permissible?

Some time after Gionis had retained counsel, he showed up at Lueck's office one day very upset with some work his lawyer had done, and in desperation, asked Lueck to make an emergency ex parte appearance for him because his lawyer was unavailable. Lueck agreed, was unsuccessful in court, but was paid \$750 for the appearance.

The Court cited California Evidence Code Section 951 to define a "client" for purposes of the attorney-client privilege as someone who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." (*Id.* at 1207 (citing California Evidence Code §951).) The Court also recognized that a person's information may be covered by the privilege, even if they do not retain the attorney, if the information was communicated with the view toward professional employment. (*Id.* at 1208 (citations omitted).)

The Court did not find an attorney-client relationship between Lueck and Gionis under either of these standards. In further support of finding the attorney-client privilege inapplicable to the statements by Gionis, the Court stated that the privilege does not apply "whenever issues touching upon legal matters are discussed with an attorney." (*Id.* at 1210.)

The Court continued, "a communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client." (*Id.* (citing *Solon v. Lichenstein* (1952) 39 Cal.2d 75, 79-80).) Further, "it is not enough that the client seek advice from an attorney; such advice must be sought from the attorney 'in his professional capacity.'" (*Id.* (citing California Evidence Code Section 951).)

The Court further distinguished the situation at issue from those where a person discloses information to a lawyer whom they are thinking of retaining. In this case, the incriminating statements were made *after* Lueck explicitly told Gionis that he would not represent him. When a person continues to speak with a lawyer who has explicitly refused to represent them, they are no longer seeking advice from the lawyer "in his professional capacity." (*Id.*)

■ This article does not constitute legal advice. Please shepardize all case law before using.

■ *Wendy Patrick Mazarella is a San Diego County Deputy District Attorney in the Sex Crimes and Stalking Division, chair of the San Diego County Bar Association Legal Ethics Committee and a member of the bar's Committee on Professional Responsibility and Conduct.*

Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. California Evidence Code §950 defines a lawyer as someone that a prospective client knows is authorized to practice law.
2. If a client falsely believes that a legal communication with his or her lawyer is private, it will nonetheless be considered to be a confidential communication.
3. Even a casual conversation at a cocktail party may potentially create a circumstance where a communication made is entitled to protection.
4. The attorney-client privilege will protect a conversation that a person has with a lawyer if they discuss “issues touching upon legal matters.”
5. If a lawyer has received confidential information from a person, he or she may be precluded from representing the opposing party even if the lawyer never formally enters into an attorney client relationship.
6. A casual conversation at a party may be protected if someone is telling a lawyer an entertaining story about a past case they were involved in.
7. Even if an attorney has acquired material confidential information from one party, he or she may accept representation adverse to that party as long as the party gives oral consent.
8. Unsolicited confidential e-mail generally does not form an attorney- client relationship.
9. A person who continues to share information with a lawyer who has already politely explained that he or she cannot represent the person may still qualify as a “prospective client” under ABA Rule 1.18.
10. Prospective clients are entitled to just as much confidentiality as current clients.
11. Because there is no specific prospective client State Bar ethical rule, we are bound to follow ABA Rule 1.18.
12. A person’s statements made to a lawyer will not be protected after the lawyer specifically refuses to represent them.
13. A person’s information will never be protected if the lawyer is just politely listening in order to humor them, but plans to eventually explain they cannot take their case.

14. A person who consults a lawyer cannot be a client unless he or she intends to retain the lawyer.

15. A person may engage in business dealings with a lawyer as a business associate and not be entitled to claim confidentiality of their information.

16. A speaker who discusses the facts of his case with a lawyer he is considering retaining in front of a crowd of people at a party can still claim confidentiality of the information.

17. The fact that a lawyer agreed “to look into” a matter for someone will be considered in determining whether or not an attorney-client relationship was formed.

18. A person who continues to discuss his or her case with a lawyer after the lawyer has explicitly declined representation cannot claim a good faith belief in the existence of the attorney-client relationship.

19. A lawyer who obtained confidential information from a party under an implied-in-fact contract triggering the protection of the attorney-client privilege may not accept employment adverse to the party only when the confidential information they received is material.

20. The question of whether or not someone is a “client” for purposes of the attorney-client privilege depends on the actions of the attorney.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

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