The Law of the Litigator

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The Accidental Client

"You're a lawyer? Thank goodness! I really need to talk to you!" 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. There are few things that can change the nature of the conversation at a cocktail party faster than when someone in desperate need of legal advice discovers that you are a lawyer. And before you can halt the onslaught, you are hit with an avalanche of confidential facts you are probably going to wish you never heard. Is there any way to avoid this uncomfortable and often embarrassing predicament?

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 someone 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.

But read on. There are several ways in which the smart lawyer can deliberately avoid the unintentional formation of the attorney-client relationship.

Forming The Attorney-Client Relationship In Non-Traditional Settings

When a tipsy partygoer decides to belt out the facts of her daughter's drunk driving case to someone who was just introduced to her as a lawyer at a party, several results are possible. If the drunken disclosure is made amid a crowd of people, the lawyer may be in a good position to argue that he or she has no duty to keep the information confidential. If the reveler asks the lawyer to please step into the other room so they may talk privately, however, and the lawyer does so, he or she may have effectively led the guest to believe they were speaking to the lawyer in confidence in their professional capacity. Another tricky situation for a lawyer is when a well-meaning party host deliberately brings

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over a guest for the specific purpose of a legal conversation. What does the lawyer do? After politely explaining that he or she "doesn't do that type of work" or "doesn't take private clients," the lawyer feels compelled out of courtesy to continue to listen as undaunted, the potential soon-to-be client proceeds to deliver an earful about the particulars of their case.

California Formal Opinion 2003-161

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2003-161 addresses this issue. It 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:

• If an attorney-client relationship is created by the contact; or

• 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;

• 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 sections 952-955) which "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 Section 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 section 6068(e) and Cal. R. Prof'l. Conduct 3-310(E) to persons who never actually become clients.

Declining Representation: Are You Still On The Hook For Informal Advice?

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 which 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,* 892 P.2d 1199 (Cal. 1995) sheds some light on some of the issues involved in this dilemma, and their resolution.

In *People v. Gionis,* 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. *Id.* at 1201. 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. *Id.* 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 1202. 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. The Court found the statements at issue were not protected by the attorney-client privilege. *Id.* at 1208-09. This case presents an interesting analysis because although Lueck explicitly refused to represent Gionis, their relationship during the time period in question did include a limited amount of legal discussion and a subsequent emergency court appearance.

In this case, Gionis' incriminating statements were made after Lueck explicitly told Gionis that he would not represent him. *Id.* at 1206-07. 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 1207. 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.*

Separating Professional Advice From Lending An Ear As A Friend

In *State v. Branham* 952 So.2d 618 (Fla. Dist. Ct. App. 2007), the court held that statements made to a lawyer as a personal family friend are not protected by the attorney client privilege. In Branham, Michael Branham was represented by James Kelly in a negligence case, but also made statements to Kelly as a personal friend about wanting to murder his wife, with whom he was going through a divorce. The statements were made the week before Branham killed his wife, when Kelly was at Branham's house for a social visit, and immediately after Branham asked Kelly if he was his attorney and Kelly responded "sure." *Id.* at 619-620. When Branham was prosecuted for the murder of his wife he successfully suppressed the statements in the trial court citing attorney client privilege; this ruling was overturned. After citing the attorney-client privilege rule, the court held that in this case, the conversation at issue during which Branham talk-