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# Wisconsin Formal Ethics Opinion EF-11-03: Who is a Prospective Client; Lawyer Websites and Unilateral or Unsolicited E-mail Communications

July 29, 2011

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*Synopsis: A person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. Consequently, the duties a lawyer owes prospective clients are not triggered by an unsolicited e-mail communication that “the lawyer receives out of the blue from a stranger in search of counsel, as long as the lawyer did not do or publish anything that would lead reasonable people to believe that they could share private information with the lawyer without first meeting [the lawyer] and establishing a lawyer-client relationship.”<sup>1</sup> To avoid creating ethical duties to a person in search of counsel, a lawyer who places advertisements or solicits email communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that the lawyer-client relationship is created solely by virtue of the person's response and that the person's response is confidential. The most common approach is the use of disclaimers. These disclaimers must have two separate and clear warnings: that there is no lawyer-client relationship and that the e-mail communications are not confidential. Moreover, these warnings should be short and easily understood by a layperson. Use of nonlawyer staff to screen or communicate with prospective client will not relieve a lawyer of responsibilities arising under SCR 20:1.18.*

## **Introduction**

Legal practice today relies heavily on electronic communication. A person seeking representation has several means, including e-mail communication and lawyer websites,<sup>2</sup> to contact a lawyer and provide information. Even though communication through a website or an e-mail is similar in many ways to a letter or voice-mail, electronic communication presents a unique problem: the lawyer may have less control over the receipt of information. The receipt of information raises concerns regarding the ethical duties that the lawyer owes to the person sending the information through the website or by e-mail.

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<sup>1</sup> 23 ABA/BNA Law. Man. Prof. Conduct 479.

<sup>2</sup> “Websites offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.” ABA Committee on Eth. And Prof'l Responsibility, Formal Op. 10-457 (2010)(Lawyer Websites).

The ethical duties owed to a person seeking representation are determined by whether that person is classified as a “prospective client” within the meaning of Supreme Court Rule 20:1.18, which became effective on July 1, 2007. SCR 20:1.18 defines “prospective client” and articulates the ethical duties that a lawyer owes to a prospective client.<sup>3</sup> Prospective clients receive some, but not all, of the protection afforded clients.<sup>4</sup> A person who is not a prospective client receives neither the protection afforded clients, nor the protection of SCR 20:1.18.<sup>5</sup> Consequently, whether the lawyer owes an ethical duty of confidentiality or loyalty to the person providing information through a lawyer website or sending the e-mail is determined by whether that person is classified as a “prospective client.”

### **Defining “Prospective Client”**

SCR 20:1.18(a) defines a prospective client as “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter. To ‘discuss,’ meaning to talk about, generally contemplates a two-way communication, which necessarily must begin with an initial communication. Rule 1.18 implicitly recognizes that this initial communication can come either from a lawyer or a person who wishes to become a prospective client.”<sup>6</sup> While SCR 20:1.18(a) appears to define a prospective client broadly, ABA Comment [2] specifically limits that definition. “Not all persons who communicate information to a lawyer are entitled to protection under this Rule.”<sup>7</sup> This Comment recognizes that not all initial communications from a person seeking representation will result in a discussion within the meaning of the Rule. Moreover, a person is entitled to the protections of the Rule only when that person contacts a lawyer in good faith and with a reasonable expectation of forming a possible lawyer-client relationship.

### Good Faith Requirement

Inherent in the definition of “prospective client” in SCR 20:1.18(a) is a requirement that the person contact the lawyer in good faith to determine whether to retain the lawyer. A person who imparts information to a lawyer as part of a strategy to disqualify the lawyer from representing an adverse party is not a “prospective client” and not entitled to the protections of

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<sup>3</sup>Even though SCR 20:1.18 has no counterpart under the previous Rules, its language is identical to the language of ABA Model Rule 1.18. Moreover, ABA Model Rule 1.18 is “a direct paraphrase” of § 15 of the *Restatement (Third) of the Law Governing Lawyers (2000)*. Minutes of Meeting of Commission on Evaluation of Rules of Professional Conduct February 5-6, 1999.

<sup>4</sup> SCR 20:1.18 ABA Comment [1]. Prospective clients, like clients, often disclose information to a lawyer and rely on the lawyer’s advice. However, a lawyer’s discussion with a prospective client is usually limited in time and depth. The prospective client is free to proceed no further: the lawyer is also free and sometimes required to proceed no further.

<sup>5</sup> ABA Committee on Eth. And Prof’l Responsibility, Formal Op. 10-457 (2010)(Lawyer Websites), note 18.

<sup>6</sup> ABA Committee on Eth. And Prof’l Responsibility, Formal Op. 10-457 (2010)(Lawyer Websites).

<sup>7</sup> SCR 20:1.18 ABA Comment [2].

the Rule.<sup>8</sup> Moreover, the lawyer may raise the absence of good faith as a defense to disqualification.<sup>9</sup>

### Reasonable Expectation Requirement

Not only must the person contact the lawyer in good faith, but, the person must have a “reasonable expectation” that the lawyer is willing to discuss forming a client-lawyer relationship.<sup>10</sup> The purpose of SCR 20:1.18 is to protect a prospective client’s reasonable expectations. A person does not become a prospective client by merely transmitting information to a lawyer. ABA Comment [2] explains: “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).”<sup>11</sup> The reasonable expectation requirement balances three important public policies: encouraging the broadest access to legal services; encouraging trust and communication between persons seeking legal services and the lawyers they consult; and protecting the lawyers’ current clients and prospective clients from conflicts created when persons seeking legal services unilaterally disclose information.<sup>12</sup>

The broadest access to legal services is fostered by public dissemination of a lawyer’s contact information, and by merely disseminating contact information, practice areas and types of clients served, lawyers do not invite persons to send them information that may create duties of loyalty and confidentiality. While public dissemination of a lawyer’s contact information may be a request to contact, it is not by itself a request for information.<sup>13</sup> A person seeking representation does not need to unilaterally disclose private information: there are “other and

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<sup>8</sup>See ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 90-358 (1990) at n. 3; North Carolina State Bar, NC Eth. Op. RPC 244 (1997). In addition to the lack of good faith, “a person who purports to be a prospective client and who communicates with a number of lawyers with the intent to prevent other parties from retaining them in the same matter should have no reasonable expectation of confidentiality or that the lawyer would refrain from an adverse representation.” ABA Committee on Eth. And Prof’l Responsibility, Formal Op. 10-457 (2010)(Lawyer Websites).

<sup>9</sup>*Restatement (Third) of the Law Governing Lawyers*, § 15, Comment c provides that a tribunal may consider whether the person disclosed information to the lawyer “for the purpose of preventing the lawyer of the lawyer’s firm from representing an adverse party rather than in a good-faith endeavor to determine whether to retain the lawyer.”

<sup>10</sup> *Restatement (Third) of the Law Governing Lawyers*, § 14 provides:

Formation of a Client-Lawyer Relationship

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; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.

<sup>11</sup> SCR 20:1.18 ABA Comment [2].

<sup>12</sup>San Diego Ethics Op. 2006-1(2006).

<sup>13</sup> Iowa State Bar Ass’n Comm. On Ethics and Practice Guidelines, Op. 07-02 (Aug. 8, 2007).

safer means of ensuring that an attorney is available for professional employment or does not otherwise have a conflict of interest.”<sup>14</sup> A person can send an unsolicited e-mail asking about the lawyer’s availability, or call the lawyer’s office to speak with the lawyer or to determine the lawyer’s availability.<sup>15</sup> Nor does disseminating a lawyer’s contact information create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. Before a lawyer has any discussion with a person about the possibility of forming a client-lawyer relationship, the lawyer should have the opportunity to perform a routine conflicts check to determine whether the lawyer may undertake the representation.

Prospective clients rightfully believe that what they tell the lawyer is protected by the duty of confidentiality, because in the normal sequence of events, the lawyer-client relationship precedes the disclosure of information.<sup>16</sup> Trust and adequate communication are fostered by protecting the confidentiality of communications between persons seeking legal services and the lawyers they consult. The rationale for extending the duty of confidentiality to prospective clients lies in the need for a prospective client to reveal information in the consultation after the lawyer has agreed to consider forming a relationship. The relationship itself proves the reasonableness of the expectation. However, it is not reasonable to expect that the duties of confidentiality and loyalty will be extended to a person who foists confidences on a lawyer without any indication that the lawyer is willing to consider forming a lawyer-client relationship.<sup>17</sup>

Moreover, current clients should be protected from conflicts created when persons seeking legal services unilaterally disclose information. If merely sending an unsolicited communication containing private information triggered the ethical obligations of loyalty and confidentiality, persons seeking legal services could unilaterally disrupt existing lawyer-client relationships by creating conflicts of interest. Such conflicts would penalize the clients merely because they happened to be the adversaries of the persons seeking legal services and penalize the lawyers merely because they disseminated their contact information.<sup>18</sup> Consequently, a person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and, absent more, is not a prospective client under SCR 20:1.18(a).

### **Unsolicited E-mail Communications**

Most ethics committees agree that the duties a lawyer owes prospective clients are not triggered by an unsolicited e-mail communication that “the lawyer receives out of the blue from a stranger in search of counsel, as long as the lawyer did not do or publish anything that would lead reasonable people to believe that they could share private information with the lawyer

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<sup>14</sup> San Diego Ethics Op. 2006-1(2006).

<sup>15</sup> *Id.*

<sup>16</sup> Iowa State Bar Ass’n Comm. On Ethics and Practice Guidelines, Op. 07-02 (Aug. 8, 2007).

<sup>17</sup> State Bar of Arizona Comm on the Rules of Professional Conduct, Op. 02-04 (Sept. 2002).

<sup>18</sup> San Diego Ethics Op. 2006-1(2006).

without first meeting [the lawyer] and establishing a lawyer-client relationship.”<sup>19</sup> In their opinions, these committees frame the analysis in terms of two specific examples.

In one example, a lawyer met with a prospective client. While considering whether to accept the case, the lawyer received an e-mail from the potential adverse party requesting representation and supplying private factual information. The lawyer had no prior relationship with the potential adverse party and did not engage in public marketing that would suggest that the potential adverse party could unilaterally disclose factual information to the lawyer with an expectation of confidentiality. The lawyer owed no professional duty to the potential adverse party, and the information transmitted was not protected by the duty of confidentiality.<sup>20</sup>

In the other example, an employee of a company wrote a letter to the human resources department in which he complained that his managers were abusive to him and that his work environment was hostile. When he received no satisfactory response from the human resources department of the company, he searched the internet and found the names of eleven employment lawyers. He had never met or spoken with any of the lawyers. The employee then emailed each lawyer, saying that he was looking for a plaintiff’s employment lawyer to represent him against the company, which he named in the email. He also attached to the email a copy of the letter that he sent to the human resources department. One of the eleven lawyers who received the email was the outside counsel for the company. That lawyer maintained an email address, but did not have a website or advertisement on the internet. The lawyer owed no duty to keep confidential the information within or attached to the unsolicited email, and did not violate any duty to the employee by forwarding the email to the company. “The purposes of the [confidentiality rule] are not discouraged by declining a would-be client the benefits of confidentiality when no steps are taken to maintain the confidence of information and the attorney has not ‘agreed to consider’ the relationship.”<sup>21</sup>

### **Contacts in Response to Lawyer Advertising and Lawyer Websites**

By using the term “unilaterally” in conjunction with the lack of a reasonable expectation, ABA Comment [2] cautions that a lawyer should not do anything that would lead a person to

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<sup>19</sup> 23 ABA/BNA Law. Man. Prof. Conduct 479.

<sup>20</sup> Iowa State Bar Ass’n Comm. On Ethics and Practice Guidelines, Op. 07-02 (2007). The Iowa Committee concluded that this situation was the type envisioned by Comment [2]. See also San Diego Ethics Op. 2006-1 (2006). Even though California has no counterpart to ABA Model Rule 1.18, the San Diego Committee concluded that private information received by an unsolicited e-mail is not required to be held as confidential by the lawyer if the lawyer has not had an opportunity to warn or stop the flow of the information before or when the communication is delivered. The Committee further concluded that the lawyer could use the information received in the unsolicited e-mail in representing a client.

<sup>21</sup> State Bar of Arizona Comm on the Rules of Professional Conduct, Op. 02-04 (2002). The Arizona Committee concluded that declining the benefits of confidentiality to would-be clients who foist confidences on unsuspecting lawyers outside of a consultation does not detract from the purposes of Rule 1.6 when the lawyer has not agreed to consider the relationship. However, if the lawyer maintains a website without any express limitations on forming a lawyer-client relationship or disclaimers explaining that information provided by the would-be client will not be held in confidence, the lawyer may have implicitly agreed to consider forming a relationship.

reasonably believe that he or she could share information and that confidentiality would be respected. When a person contacts a lawyer in response to the lawyer's advertising, such as through a website which provides the lawyer's e-mail address and encourages people to contact the lawyer, the person's contact is not necessarily unsolicited, and the communication is no longer unilateral.

For example, if a lawyer website specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18, will result when a website visitor submits the requested information. If a website visitor submits information to a site that does not specifically request or invite this, the lawyer's response to that submission will determine whether a discussion under Rule 1.18 has occurred.<sup>22</sup>

To avoid creating ethical duties to the person, a lawyer who places advertisements or solicits e-mail communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that the lawyer-client relationship is created solely by virtue of the person's response and that the person's response is confidential. "Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in the discussion."<sup>23</sup> Consequently, lawyers should pay close attention to the warnings or disclaimer on their websites.

## **Disclaimers**

Most lawyers have posted express disclaimers stating that no information communicated by the person will create an attorney-client relationship. These disclaimers should be drafted carefully. It may seem that an express disclaimer stating that no information communicated by the person will create an attorney-client relationship should be effective because no one responding to the web-site could, in the face of such an express disclaimer, reasonably believe that an attorney-client relationship had been created. However, what is "reasonable" is measured from the perspective of the layperson, not the lawyer; and what is reasonable to the layperson is different from what is reasonable to a trained lawyer. Similarly, a lawyer's blanket statement that there is no lawyer-client relationship until both lawyer and client agree to create one may not be detailed enough to protect the reasonable expectations of the untrained layperson and to avoid classifying the person as a prospective client.

The disclaimer must have two separate and clear warnings. The disclaimer must make it clear that there is no lawyer-client relationship and that the e-mail communications are not confidential.<sup>24</sup> Moreover, the language of the disclaimer should be short and easily understood

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<sup>22</sup> ABA Committee on Eth. And Prof'l Responsibility, Formal Op. 10-457 (2010)(Lawyer Websites).

<sup>23</sup> Id.

<sup>24</sup> 22 ABA/BNA Law. Man. Prof. Conduct 286. Some firms use a pop-up that appears on the screen to inform the reader that the Web site is not intended to create an attorney-client relationship, that any e-mail sent to the firm or its lawyers will not create an attorney-client relationship, and will not be treated as confidential. Other firms use a

by a lay person: the longer the disclaimer gets, the more confusing it could be, and the less likely it is to be read.<sup>25</sup> While no example will fit every situation, some examples are included in an appendix to this opinion.

### **Routing All Unsolicited E-mail to a Nonlawyer**

Some law firms route all unsolicited emails to a nonlawyer who decides whether and where to direct the email.<sup>26</sup> Other firms use a generic email address and do not include the individual lawyer's email address on the website.<sup>27</sup> Washington State Bar Informal Opinion 2080 advises lawyers to "implement procedures by which non-lawyer staff receive and review inquiries to screen for conflicts."<sup>28</sup> While this type of procedure may be one of the "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,"<sup>29</sup> the information is still within the firm and subject to the imputation rule of SCR 20:1.10.<sup>30</sup>

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"click wrap" agreement. The same type of pop-up disclaimer appears when the reader attempts to send the lawyer an e-mail, and the reader is then required to click "continue," "submit," or "I agree."

<sup>25</sup> Id.

<sup>26</sup> 22 ABA/BNA Law Man. Prof Conduct 286.

<sup>27</sup> Id.

<sup>28</sup> Wash. State Bar Informal Op. 2080 (2006)

<sup>29</sup> SCR 20:1.18(d)(2).

<sup>30</sup> The use of support staff to conduct initial interviews with prospective clients will not insulate the lawyer from information that could be "significantly harmful." See Michigan Informal Ethics Op. RI-123(1992)

## **Appendix: Example Disclaimer Language**

Example:

If you are seeking representation, please read the following notice before sending an e-mail to our firm:

Sending us an e-mail will not make you a client of our firm. Until we have agreed to represent you, anything you send us will not be confidential or privileged. Before we can represent you, a lawyer will first take you through our conflict of interest procedure and see that you are put in touch with the lawyer best suited to handle your matter.

If you proceed with an e-mail, you confirm that you have read and understood this notice.

Example:

If you send e-mail through this service, your e-mail will not create an attorney-client relationship, and any information you include in your e-mail will not necessarily be treated as privileged or confidential. You should not send sensitive or confidential information through this e-mail service. The firm may not choose to accept you as a client. Moreover, the Internet is not necessarily a secure environment, and it is possible that your e-mail might be intercepted and read by third parties.

Example:

### **Please Read Before Sending E-Mail.**

Please note that any communication with us by e-mail through this website does not constitute or create an attorney-client relationship with us. Please do not send any confidential information. A conflicts-of-interest procedure must be completed by us before we can establish an attorney-client relationship with you.

By clicking "Accept/Submit" below, you agree that we may review any information you transmit to us. You recognize that our review of your information, even if it is highly confidential and even if it is transmitted in a good faith effort to retain us, does not preclude us from representing another client directly adverse to you, even in a matter where that information could and will be used against you.

If you wish to discuss the possibility of potential legal representation, you may request a consultation by e-mail or by calling one of our offices.

Example:

CAUTION: Before you proceed, please note.

Do not send us any information that you or anyone else considers to be confidential or secret unless we have first agreed to be your lawyers in that matter. Any information you send us before we agree to be your lawyers cannot be protected from disclosure.

By clicking “accept” you agree that our review of the information contained in the e-mail and any attachments you send to us will not create a lawyer-client relationship with us, and will not preclude any lawyer in our firm from representing a party in any matter where that information is relevant, even if that information is highly confidential and could be used against you.

Example:

While we would like to hear from you, we cannot represent you until we know that doing so will not create a conflict of interest. Accordingly, do not use any of the supplied e-mail to send us any confidential or private information until you speak with one of our attorneys and receive our authorization to send that information to us.

Example:

NOTICE: Please note that we cannot act as your attorney or provide you with any legal advice until we know that doing so will not create a conflict of interest. While we welcome inquiries, please do not send us any secret, confidential, or privileged information until you receive a written confirmation from us that we have agreed to serve as your lawyer. Unsolicited emails from non-clients containing confidential or secret information cannot be protected from disclosure. The best way for you to discuss a possible representation is to call us at (phone number). We will make every effort to put you in touch with a lawyer suited to handle your matter.