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How to Avoid the Surprise Attorney-Client Relationship

By Evan L. Loeffler

I am the only lawyer in my immediate circle of friends. Friends and acquaintances frequently ask me casual questions about the law, sometimes not in my field of expertise. I live across the country from my parents and their friends, who also occasionally call me for my opinion on legal matters. I am at the courthouse at least once a week, and people frequently approach me with questions ranging from "where is the law library?" to "where do I file this document?" to "what do I need to write to answer this complaint?"

Over the years, I have learned to exercise restraint in attempting to answer any of these questions (except about the library: it's on the sixth floor on the left). I have nearly been burned more than once after giving casual advice and later realizing the person I advised believed that we now had an attorney-client relationship.

One such uncomfortable experience occurred when I received a telephone call from my father. Years earlier, Dad had attached a number of razor-sharp steel blades to a steel chassis with a sail. He called it an "ice boat." He took it out on the ice that winter and whizzed around at high speed until he nearly killed himself flipping it over in a gale. Fully healed now, Dad wanted to know if there was anyone he could sue.

"Well, Dad," I said. "You can't sue the manufacturer for product liability since you built the thing yourself. There's a pretty good assumption of the risk defense since you decided to go sailing in a gale. And you can't sue God for the weather because he's out of the court's jurisdiction."

Dad was not satisfied. Apparently someone had told him otherwise. I wrote him a letter explaining that I did not think he had a case, but that he should consult a personal injury lawyer. "I am not a personal injury lawyer," I wrote. "I am also not a lawyer in your state, so you are just as likely to get competent legal advice from the cat as you are from me. You should talk to a lawyer sooner rather later in case there is a statute of limitations on your claim." I also included a bill for \$50 (which was not paid). Dad has not since raised the subject.

Casual Legal Advice

On a daily basis, lawyers communicate with clients, prospective clients, colleagues, friends, and family. Many conversations are understood by all parties to be

between a lawyer and a client. This is not always the case. Lawyers can, in the course of conversation the lawyer believes to be casual, make a statement that can be construed as giving legal advice. The "cocktail advice" example is common: A lawyer is asked a legal question in a social setting, gives an off-the-cuff response, and learns later that someone relied on that advice to his or her detriment and is holding the lawyer responsible.

Another common example for lawyers who are regularly at the courthouse is when a *pro se* litigant approaches them in the courtroom or in the clerk's office. Such encounters usually start with, "Excuse me, but are you a lawyer? Can I ask you a quick question about my case?" The attorney listens politely, gives a quick word of advice, and then has to fend off numerous follow-up questions as the interrogator seeks a crash course on the practice of law.

There is also the scenario where an attorney-client relationship is notionally contemplated by all parties, but the lawyer is not clear enough that one does not exist. There are numerous examples in the court reporters where a potential client visits a lawyer in her office, leaves incorrectly believing he has a lawyer, and does not discover otherwise until after the statute of limitations has lapsed.

In all three situations it is the lawyer's responsibility to be clear about whether representation has commenced. A layperson may be able to incorrectly give legal advice, but a lawyer has a higher degree of responsibility as a professional. As a lawyer, it is critical not only to understand when the attorney-client relationship commences, but to delineate clearly when this occurs—and when it does not—to the potential client.

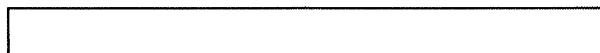
Life would be a lot simpler if there was theme music or a gong that would sound when something momentous occurs. Even if there were such a cue, there would be a lot of variation from case to case on when the attorney-client relationship started. Many lawyers take the position that the attorney-client relationship commences only after the attorney agrees to representation. Others say it only occurs after a client interview takes place, a fee agreement is signed, and a retainer or fee deposit check has cleared the bank. Unfortunately, it's more complex than that.

The relationship begins when there is a mutual understanding that the client is going to confide in the attorney and the attorney is going to listen. The attorney-client relationship may commence even if there is nothing in writing. The relationship may commence even if no money has changed hands. Although there must be a mutual understanding that the client has engaged the lawyer and the lawyer has accepted representation, it is the attorney's responsibility to make it clear to the

potential client when this has occurred, and when it has not.

Some suggestions:

- Do not give legal advice outside your field of expertise. Although it is obvious to most attorneys that a lawyer who primarily does family law is not qualified to discuss the niceties of intellectual property law, it is not obvious to all laypersons. If you are discussing an area outside your normal field, clearly indicate that fact: "I am not a tax lawyer and I don't know enough about tax law to properly advise you. You should really talk to a tax professional about whether you are properly deducting that expense."
- Do not give legal advice on a situation pending in a jurisdiction where you are not licensed to practice. Rules and procedures, and even statutes of limitation, vary wildly from state to state.
- If you determine the other party already has a lawyer, resist the urge to second guess. The fact is the other lawyer has spent a lot more time on the case than you and is familiar with a lot of facts that the person you're speaking with may not have disclosed. You would not appreciate unsolicited advice from a lawyer telling you how to do your job. Consider that before telling someone that you would handle a situation differently than that person's attorney.
- Make it clear the person may have a legal problem that he or she should consult with a lawyer about. If that lawyer is you, offer to schedule an appointment in your office and discuss what you will charge.
- Encourage the questioner to seek formal advice quickly, especially if there is a statute of limitations affecting a possible claim.
- Always follow up in writing. Reiterate what you advised, your understanding of the facts that you relied on in formulating the advice, the existence of the statute of limitations, and the importance of obtaining competent legal advice.
- Remember that whatever the client told you is presumed to be in strictest confidence. You cannot share juicy gossip with your other friends simply because you learned about it in casual conversation. If the other party reasonably believed the information was subject to the attorney-client privilege, then it was. This is so even if you expressly decline representation.



Sample Letter Declining Representation

Dear Client:

Thank you for meeting with me today in my office. As we discussed, I am unable to assist you with your case, and I have returned the documents you asked me to review. Because I am declining representation, I will not be able to answer any further questions regarding your matter. I regard everything you told me as strictly confidential and will not discuss it with anyone.

You should consult with another attorney who may be better suited to work on your matter quickly in case the statute of limitations acts as a bar to your case.

I wish you the best of luck.

Warmest regards,

Evan

Declining Representation

Unlike personal relationships, professional relationships do not necessarily go away when one party stops returning phone calls. Lawyers must clearly indicate there will be no attorney-client relationship.

When I first hung out my shingle, a gentleman visited me seeking representation. I met with him in my office and he explained to me his belief that the government had installed transmitters in his teeth and was spying on him. He had 20 handwritten pages of information demonstrating why he was a danger to the establishment and why "they" were keeping such close tabs on him. I told the gentleman I could not help him and promised to keep it secret that he had consulted with me.

About a month later I received a phone call from the court. The guy was being evicted and indicated I was his lawyer. He had informed his landlord he had consulted a lawyer and was not obligated to pay his rent. The landlord did not agree. The judge was conducting an eviction hearing and the defendant was asking for a continuance because I could not be present. The court was calling me to determine when I would be available. Here are the thoughts I had in mind during the conversation:

- All I can say to the court is to confirm that I once met with the man, but that I do not represent him.
- I cannot disclose what I discussed with the "client" to the court. It would be a violation of the attorney-client privilege to do so and could harm his case and credibility (such as it was).

- Holy @\$#%& this guy is crazy!

In hindsight, I realized it would have been better if I had written a letter clearly declining representation. Then, if the client argued that I was his lawyer, I could have produced the letter establishing that was not the case. Since then, I have sent out several "decline" letters, a copy of which I store in my "potential clients" file (see sample in the sidebar).

Such a letter can avoid any misunderstanding between you and most potential clients. Your malpractice carrier will, no doubt, be pleased as well.

Conclusion

As with most relationships, communication is key in these interactions. If conversation is turning into professional work, it is the lawyer's responsibility either to put a stop to it or to make it clear that further discussion should take place in a more formal setting. Similarly, when the lawyer has no intention of representing a potential client, the lawyer has the responsibility to communicate that no attorney-client relationship exists.

So, I have learned to keep quiet at cocktail parties. This enables me to eat more hors d'oeuvres and canapés. I figure that's what they're there for.

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