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Law Firm Website Woes: Educating and Disclaiming Prospective Clients

Introduction

Thank you for taking the time to read this publication. Please note that by reading this publication, an attorney-client relationship has not been established, the information provided herein is presented from a risk control perspective and should not be perceived as legal advice.

Few, if any, readers would contemplate the creation of an attorney-client relationship by reading a publication in print, via email or on a website. Has an attorney-client relationship been formed, however, regarding attorney interactions with prospective clients via law firm websites, email correspondence, social media platforms and texts or telephone calls? When should attorneys take the proactive step of disclaiming the formation of an attorney-client relationship? In this article, we will explore various interactions between attorneys and prospective clients and techniques to explain and disclaim the formation of an attorney-client relationship, when necessary.

Due to the evolution from pen and parchment to laptops, smartphones and the internet, the opportunities to interact with prospective clients seem infinite and thus, potentially problematic for attorneys.

Interactions with Prospective Clients

Traditional interactions with prospective clients involved a telephone call or an in-person meeting to discuss a potential representation. Due to the evolution from pen and parchment to laptops, smartphones and the internet, the opportunities to interact with prospective clients seem infinite and thus, potentially problematic for attorneys. Attorneys always must be alert to interactions with a prospective client and are responsible for ensuring that a prospective client understands whether or not transitioning to a current client status will occur, as well as informing a prospective client that the initial interaction does not mean a representation has been accepted by the attorney or the law firm.

Legal support staff also interacts with prospective clients via various media. Therefore, support staff also must understand the importance of managing the expectations of prospective clients. Moreover, they should not create the appearance that a client representation has been accepted until all necessary information has been reviewed by the attorney or law firm, and a final decision has been made as to whether or not the representation will be accepted.

Duty to Disclaim, Explain and Limit Information Exchanged

In reviewing the ABA Model Rules of Professional Conduct, a rule entitled, "Duty to Disclaim" does not exist. However, *ABA Model Rule 1.18: Duties to Prospective Clients*, provides guidance on best practices when interacting with a prospective client. In addition to the model rules, attorneys should review ethics opinions in their jurisdictions for more detailed information on how best to manage interactions with a prospective client.

The comments to ABA Model Rule of Professional Conduct 1.18 explain that attorney interactions with prospective clients require explaining to the prospective client that an attorney-client relationship has not been established, and the attorney should, therefore, limit the information provided by the prospective client to the attorney. Meeting these requirements may be easier in person but also should be explained when a prospective client contacts an attorney or law firm via a law firm website or other non-traditional avenues, such as a social platform, consumer website, email or text message.

Attorneys and law firms also should review ABA Model Rules of Professional Conduct 7.1: *Communication Concerning a Lawyer's Services* and 7.2: *Communication Concerning a Lawyer's Services: Specific Rules* in order to confirm that information provided on the law firm website is not misleading as to legal services provided by the law firm. Moreover, such information should not create unrealistic expectations for prospective clients visiting the law firm website. An often overlooked step in providing information on law firm websites is to obtain the informed and written consent of former clients before posting information related to the law firm website as a "success story". Attorneys and law firms should explain their intention to use such information, obtain the former client's written consent to use the information on the law firm website, and maintain documentation of this authorization.

By providing appropriate disclaimers, attorneys and law firms may avoid confusion, as well as legal malpractice claims by a prospective client that did not evolve to a current client.

Sample Website Disclaimer Language

A website disclaimer must be tailored to the attorney or law firm and prospective clientele. *ABA Formal Ethics Opinion 10-457: Lawyer Websites* provides detailed information of how to educate and warn website visitors as to appropriate use of the content and that it may not be relied upon by the website visitor/prospective client. As delineated in *ABA Formal Ethics Opinion 10-457*, law firm websites should avoid any confusion arising on the part of the website visitor that (1) a lawyer-client relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party.

A law firm website often will require at least two separate disclaimers. The first disclaimer is designed for any website visitor to understand that the information being provided on its website should not be assumed to be legal advice or relied upon. The second disclaimer should address those website visitors who contact the law firm or a specific attorney.

The verbiage noted herein may be considered as sample language for a law firm website disclaimer. Of course, it should be modified and designed to meet the needs of the law firm and inform prospective clients that the information provided by them should be limited and that no attorney-client relationship has been created through the provision of such information. Additional sample language is included in Appendix A.

The benefit of including a website disclaimer assists attorneys and law firms in confirming that no attorney-relationship was established by this contact, that no legal advice was provided to the prospective client, and the information presented does not preclude the attorney or law firm from taking on other client representations in the future.

"Thank you for visiting the website of [Insert Name of Law Firm or Attorney]. Please note that by visiting my/our website or communicating with any member of staff, an attorney-client relationship is not created. We will be pleased to speak with you to determine if we are able to assist you and provide competent legal representation. None of the information provided on the website should be considered legal advice."

Sample Email Communication Disclaimer Language

A prospective client visiting a law firm website is a common occurrence and probably will not create confusion as to whether or not a law firm is accepting a client representation. However, once a prospective client communicates directly with an attorney or member of the law firm staff, an expectation of representation may arise. A prospective client may misunderstand and believe that an attorney-client representation has been created upon providing documentation to the law firm or confidential information related to a potential matter. Therefore, the attorney and/or legal staff must manage the prospective client's understanding of whether or not the individual is transitioning from a prospective client to a current client.

When a law firm website offers an option for a prospective client to "Contact Us" or provide documentation to the law firm via the website or listed email addresses, the law firm should include an email disclaimer informing the prospective client that an attorney-client relationship is not created by emailing the law firm or transmitting documents. Ideally, a popup window requiring acknowledgement that the email disclaimer has been read before proceeding with emailing the law firm or sending documents would assist in defending any allegations that a law firm accepted a new matter based upon the unilateral email from the prospective client. For example, you may wish to consider including the following type of verbiage:

"Please note that by emailing our office and/or sending documents to us, an attorney-client representation is not created. Do not provide any confidential information related to your matter. There can be no expectation of confidentiality. Your communication with our office will not prevent our law firm from representing adverse parties in a related matter. We will review the information provided and respond, if appropriate. If we do not respond within seven days, the matter should be considered declined, and you should seek another attorney or law firm as soon as possible. Please acknowledge your acceptance of these guidelines before proceeding."

Unilateral Communication from a Prospective Client

Law firm websites are an excellent vehicle for practitioners to advertise their legal services, accomplishments, attorney biographies and educational resources for prospective, current or former clients. The benefits of law firm websites generally outweigh the potential legal malpractice risk exposures when managed and designed appropriately.

Attorneys and law firms must have clients to remain in business. As such, law firm websites provide an excellent opportunity to accept or decline new business. Attorneys and legal support staff, however, must be vigilant in managing interactions with prospective clients. When challenged, a prospective client's "reasonable" expectation of the formation of an attorney-client relationship will rely strongly upon the prospective client's communication with the attorney or law firm.

Clearly, attorneys do not wish to confront a Motion to Disqualify based upon communication from a prospective client who believes that a representation was accepted by the law firm. Similarly, a law firm that received confidential information from a prospective client, does not wish to be disqualified from representing an adverse party in the future.

In the matter of *Mihuti v. Mid America Clinical Laboratories, LLC*, 2019 WL 6468273, the plaintiff filed a Motion to Disqualify defense counsel based upon an email she sent to an attorney at the law firm as a prospective client. In researching the plaintiff's contact with the defense firm, it was discovered that the plaintiff had contacted a specific attorney based on the biography provided on the website. When the attorney was asked about the communication, he did not recall the prospective client or email communication. The email from the plaintiff was found, and the attorney stated that he stopped reading the email and never responded upon realizing that the sender was seeking representation as a potential plaintiff, and the law firm was a defense firm. He contended that he had not shared the email or its substance within the law firm. Moreover, the attorney who received the email was not working on the current matter involving the plaintiff.

The federal district court determined that there was not a reasonable expectation of an attorney-client relationship on the part of the prospective client/current plaintiff based upon the unilateral email correspondence with the attorney at the defendant's law firm.

Attorneys must appreciate that once they interact with a prospective client, a bilateral communication, has occurred. Therefore, the prospective client and information provided must be addressed in compliance with ABA Model Rule 1.18: Duties to Prospective Clients.

Non-Traditional Interactions with Prospective Clients

Law firm websites are controlled and monitored by the law firms and should be routinely reviewed and updated to ensure that appropriate disclaimers are in place for prospective clients visiting the websites. When prospective clients make contact through a non-traditional medium, such as a social media platform, consumer website or a text message to the attorney directly, it becomes challenging to disclaim or educate the prospective client that an attorney-client relationship has not been created. From a risk control perspective, all prospective clients should be directed to the law firm website, so that they may read the necessary disclaimers. If that protocol is not possible, the attorney must document that the prospective client has been informed that an attorney-client relationship has not been created, and that no expectation of confidentiality arises, and no legal advice has been provided. It also should be confirmed that the communication will not prohibit the attorney or law firm from representing an adverse party in the future, as noted in the previous discussion on ABA Formal Ethics Opinion 10-457.

If in Doubt, Write it Out

If there is any concern that a prospective client does not understand or acknowledge the disclaimers provided, a declination letter must be transmitted, explaining that no representation by an attorney or the law firm is being provided. Please refer to the CNA Lawyers' Professional Liability Risk Control publication, *It's Not Goodbye, Just Until We Meet Again: Declining Representation with Prospective Clients*. If the prospective client is escalated to a current client, please refer to CNA's *Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship* for sample engagement agreements.

Conclusion

Law firm websites are an integral part of the daily practice of law and building a book of business. Nevertheless, attorneys, law firms and legal support staff must ensure that prospective clients visiting the websites understand that by visiting the website or communicating directly with the law firm, an attorney-client relationship is not created. By providing appropriate disclaimers, attorneys and law firms may avoid confusion, as well as legal malpractice claims by a prospective client that did not evolve to a current client.

This article was authored for the benefit of CNA by:

Theresa Garthwaite

Theresa Garthwaite serves as Risk Control Consultant for CNA's Lawyers Professional Services program. She is responsible for the overall assessment, evaluation and delivery of risk control services for complex risk exposures within CNA's Lawyers Professional Liability business. She is responsible for developing risk control content for presentations and publications. She oversees the "In Practice ... with CNA" and "CNA's Professional Counsel" publications. Prior to joining CNA, Theresa worked as an associate in a boutique law firm, specializing primarily in plaintiffs' medical malpractice, catastrophic personal injury and wrongful death matters. She is admitted to practice in Illinois and United States District Court, Northern District of Illinois. Theresa also holds the Commercial Lines Coverage Specialist (CLCS) designation, and is a recipient of the Risk Control Superior Service Award.

Appendix A: Sample Website Disclaimer Language

The following examples, adapted from various law firm websites, may be helpful in developing disclaimers for your own firm's home page or other Internet presence.

- Material presented on the [firm name] website is intended for information purposes only. It is not intended as professional advice and should not be construed as such.
- The material presented on this site is included with the understanding and agreement that [Law Firm] is not engaged in rendering legal or other professional services by posting said material. The services of a competent professional should be sought if legal or other specific expert assistance is required.
- Any unauthorized use of material contained herein is at the user's own risk. Transmission of the information and material herein is not intended to create, and receipt does not constitute, an agreement to create an attorney-client relationship with [Law Firm] or any member thereof.
- This website is not intended to be advertising and [law firm] does not wish to represent anyone desiring representation based upon viewing this website in any state or jurisdiction where this website fails to comply with all laws and ethical rules.
- This website is not intended to constitute legal advice or the provision of legal services. By posting and/or maintaining this website and its contents, [Law Firm] does not intend to solicit legal business from clients located in states or jurisdictions where [law firm] or its individual attorneys are not licensed or authorized to practice law.
- Some links within this website may lead to other sites. [Law firm] does not necessarily sponsor, endorse or otherwise approve of the materials appearing in such sites.
- Any communication with our law firm does not constitute the creation of an attorney-client relationship. Nor does it prohibit this law firm from representing an adverse party in any future representation.
- There is no confidentiality based upon information submitted to this law firm via our website.
- Do not provide sensitive or confidential information via this website.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com