

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2005-168**

ISSUE: Does a lawyer who provides electronic means on his web site for visitors to submit legal questions owe a duty of confidentiality to visitors who accept that offer but whom the lawyer elects not to accept as clients, if the attorney disclaims formation of an attorney-client relationship and a “confidential relationship”?

DIGEST: A lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors’ reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an “attorney-client relationship” or “confidential relationship” is not formed would not defeat a visitor’s reasonable understanding that the information submitted to the lawyer on the lawyer’s web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.

AUTHORITIES

INTERPRETED: Evidence Code sections 917(b), and 951.

STATEMENT OF FACTS

Searching the Internet for law firms that specialize in divorce, Wife finds Law Firm’s web site. The site describes Law Firm’s family law practice, lists the firm’s California address, and notes that all of the firm’s attorneys are licensed to practice exclusively in California and are available to represent any person who wishes to pursue or defend a divorce action in a California court.^{1/} The web site contains a link entitled: “What are my rights?” Wife clicks on that link and is taken to a new page, which contains an electronic form. At the top of the form appears the legend: “Wondering about a legal problem you have?” The form asks for the inquirer’s name and contact information, for a statement of facts related to the reader’s legal problem, and for any questions the inquirer wishes to pose to Law Firm.

After typing in her contact information, Wife explained that she was interested in obtaining a divorce. She related that her Husband, a Vice-President at Ace Incorporated in Los Angeles, was cohabiting with a co-worker. She also stated that her 13-year-old son was living with her and asked if she could obtain sole custody of him. She noted that Husband was providing some support but that she had to take part-time work as a typist, and was thinking about being re-certified as a teacher. She revealed that she feared Husband would contest her right to sole custody of her son and that, many years ago, she had engaged in an extra-marital affair herself, about which Husband remained unaware. Wife stated that she wanted a lawyer who was a good negotiator, because she wanted to obtain a reasonable property settlement without jeopardizing her goal of obtaining sole custody of the child and keeping her own affair a secret. She concluded by noting she had some money saved from when she was a teacher, and stating, “I like your web site and would like you to represent me.”

^{1/} The terms “web site,” “home page,” “links” and “electronic mail” have the same meaning as described in California State Bar Formal Opn. No. 2001-155, at footnotes 1-3, 5.

Immediately below the text box in which Wife described her case was a list of “Terms,” which stated:

TERMS

- **I understand and agree** that I may receive a response to my inquiry from an attorney at Law Firm.
- **I agree** that by submitting this inquiry, I will not be charged for the initial response.
- **I agree** that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship.
- **I further agree** that I may only retain Law Firm or any of its attorneys as my attorney by entering into a written fee agreement, and that I am not hereby entering into a fee agreement. I understand that I will not be charged for the response to this inquiry.

Below the foregoing list of “Terms” are two buttons, one which reads “SUBMIT” and the other which reads “CANCEL,” with the following statement:

By clicking the appropriate button below, I agree to:
SUBMIT my inquiry pursuant to the foregoing terms.
CANCEL my inquiry.

Wife clicked on the “SUBMIT” button; had she clicked “CANCEL,” Law Firm’s computer would have refused to accept her information.

Upon receiving Wife’s inquiry, the law firm discovered that Husband had already retained Law Firm to explore the possibility of a divorce from Wife. The next day, an attorney in Law Firm sent Wife an e-mail, which stated:

We regret we will be unable to accept you as a client because there is a conflict with one of our present clients. Good luck with your case.

We address whether Law Firm may be precluded from representing Husband as a result of the firm’s contact with Wife on the ground that Law Firm has obtained material confidential information.

DISCUSSION

A. Introduction

In California State Bar Formal Opn. No. 2003-161, we set forth an analytical framework for determining when a lawyer might be deemed to have entered into an attorney-client relationship, or otherwise have taken on a duty of confidentiality, when people ask a lawyer about a legal problem in a setting other than the lawyer’s office. We noted that strangers do not have unilateral power to impose an attorney-client relationship or a duty of confidentiality on a lawyer through unsolicited requests for advice. When presented with such requests, a lawyer can take steps to avoid taking on duties to the inquirer, such as by stating that he or she cannot or will not represent the inquirer. (Cal. State Bar Formal Opn. No. 2003-161, at note 1 (citing to *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]); *id.* at page 6 (discussing *Gionis*.) In this opinion, we address the quite different situation the current hypothetical facts present, in which Law Firm has encouraged potential clients to present legal questions to the firm for consideration and for possible retention of Law Firm by the potential clients.

B. Must Law Firm keep confidential the information Wife transmitted?

As we noted in California State Bar Formal Opn. No. 2003-161, the attorney-client relationship, with all of the duties attendant upon that relationship – including confidentiality – “is created by contract, either express or implied.” (Id. at p. 3, citing *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181 [98 Cal.Rptr. 837]; *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22].) Law Firm never expressly agreed to enter into a client-lawyer relationship with Wife and, for the purposes of this opinion, we also assume that Law Firm did not form an implied-in-fact attorney-client relationship with Wife either. (See Cal. State Bar Formal Opn. No. 2003-161, at pp. 3-4, for a discussion of the framework for determining when an implied-in-fact attorney-client relationship has been created.)

As we explained in California State Bar Formal Opn. No. 2003-161, however, even in the absence of an attorney-client relationship, an attorney may take on a duty of confidentiality to a prospective client “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” (Cal. State Bar Formal Opn. No. 2003-161, at p. 6 (quoting Evid. Code § 951).) In Cal. State Bar Formal Opn No. 2003-161, we discussed situations in which there was some question about whether the attorney had agreed to be consulted, noting that the attorney must “evidence, by words or conduct, a willingness to engage in a *confidential consultation* with any of the individuals.” (Id. at page 5) (Emphasis in original.) Here, by providing the link that states, “What are my rights?” in combination with directions to submit facts that related to a legal problem she was “[w]ondering about,” Law Firm has invited the consultation with Wife, and has done so for the purpose of considering whether to enter into an attorney-client relationship with the inquirer.^{2/}

Law Firm has attempted to avoid taking on a duty of confidentiality by requiring each inquirer to agree that (1) by submitting a question, the inquirer is not forming an attorney-client relationship or a “confidential relationship”; and (2) whatever response Law Firm provides will not constitute legal advice but, rather, “general information.” To assess whether Wife’s agreement to these terms prevented Law Firm from taking on a duty of confidentiality, we apply the “reasonable belief” test we set forth in California State Bar Formal Opn. No. 2003-161: “If the attorney’s conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the attorney in the attorney’s professional capacity.” We do not believe that a prospective client’s agreement to Law Firm’s terms prevented a duty of confidentiality from arising on the facts before us, because Law Firm’s disclosures to Wife were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm.

First, our assumption that Law Firm did not form an attorney-client relationship with Wife is not conclusive concerning Law Firm’s confidentiality obligations to Wife. An attorney-client relationship is not a prerequisite to a lawyer assuming a duty of confidentiality in such a situation. As we explained earlier, and elaborated fully in California State Bar Formal Opn. No. 2003-161, a lawyer can owe a duty of confidentiality to a prospective client

^{2/} The consultation must, of course, be confidential for a duty of confidentiality to arise. Cal. State Bar Formal Opn. No. 2003-161, at pages 7-9. The mere fact that Wife’s transmission of her communication occurs over the Internet to Law Firm does not nullify confidentiality. An ABA ethics opinion notes that nearly every state that has addressed the issue of the duty of confidentiality in relation to e-mail has reached the same conclusion. See ABA Formal Ethics Opn. 99-413 (lawyer does not violate his or her duty of confidentiality to his or her client by communicating with the client by unencrypted e-mail). Further, in the context of attorney-client privilege, the Legislature has decreed that privileged communications may be transmitted by e-mail without jeopardizing the privilege. (See, e.g., Evid. Code § 917(b) (“A communication between persons in a relationship listed in subdivision (a) [which includes “lawyer-client” relationship] does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.”). See also *City of Reno v. Reno Police Protective Association* (Nev. 2002) 59 P.3d 1212 (citing to the California Evidence Code to hold that use of unencrypted e-mail did not waive the privilege).

who consults the lawyer in confidence for the purpose of retaining the lawyer. Thus, that an attorney-client relationship did not arise from Wife's consultation with Law Firm did not prevent Law Firm from taking on a duty of confidentiality to Wife.^{3/}

Second, Wife's agreement that she would not be forming a "confidential relationship" does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm. Cf. Virginia State Bar Ethics Opn. 1794 (June 30, 2004) (Lawyer's use of a disclaimer in non-Internet setting that stated "I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney" is not effective in preventing the lawyer from incurring duty of confidentiality to prospective client). Had Law Firm written its agreement with Wife with a plain-language reference that her submission would lack confidentiality, then that would have defeated a reasonable expectation of confidentiality. Accord, *Barton v. District Court* (9th Cir. 2005) 410 F.3d 1104, 1110 (Law firm should have spoken clearly to the laymen to whom its website was addressed about what commitments it did and did not make by a plain English explanation on the website). Without ruling out other possibilities, we note that had Wife agreed to the following, she would have had, in our opinion, no reasonable expectation of confidentiality with Law Firm: "I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm."^{4/}

Another way in which Law Firm could have proceeded that would have avoided the confidentiality issue entirely would have been to request from web site visitors only that information that would allow the firm to perform a conflicts check. For example, under the facts presented, Law Firm would first want to ensure that it does not represent the other spouse. Law Firm could explain that it is seeking the information to determine whether representing the visitor might create a conflict with one of its present clients, preventing it from representing the visitor. Law Firm could request that the inquirer provide relevant information such as the names of the parties, children, former spouses, etc., and, given the subject area, any relevant maiden names. Regardless of the precise language used, it is important that lawyers who invite the public to submit questions on their web sites, and do not want to assume a duty of confidentiality to the inquirers, plainly state the legal effect of a waiver of confidentiality. (See also D.C. Ethics Opn. 302 (providing tentative "best practices" guidance on attorney communications over the Internet to avoid formation of attorney-client relationships, including the use of prominent "click through"

^{3/} We note the differences between our facts and those the Supreme Court considered in *Gionis*, supra, 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. There, an attorney told a friend that he would not represent the friend in a marital dissolution matter. As a result, attorney-client privilege did not protect the friend's subsequent statements to the lawyer, and those comments were held admissible in the friend's subsequent criminal prosecution. The Supreme Court expressly distinguished cases "in which an individual disclosed confidential information while exploring the possibility of retaining the lawyer." (*Gionis*, 9 Cal.4th at 1210 [40 Cal.Rptr.2d at 463-64] (noting that the friend "was told in no uncertain terms, prior to making any of the challenged communications, that [the lawyer] wanted no involvement in the legal proceedings concerning defendant . . ."). Unlike *Gionis*, Law Firm has invited Wife to describe her legal problem for the specific purpose of permitting Law Firm to consider whether to agree to represent Wife and possibly to provide legal advice to Wife.

^{4/} Our conclusion finds support in the analogous situation where a person is asked to give up a right by assenting to a contract provision. Such provisions must be in sufficiently "plain language" to permit the inquirer to make a knowing waiver of the right. (See, e.g., *Powers v. Superior Court* (1987) 196 Cal.App.3d 318, 320 [242 Cal.Rptr. 55] ["Release, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are *clear, explicit and comprehensible* in each of their essential details. Such an agreement, read as a whole, must *clearly notify* the prospective releasor or indemnitor *of the effect* of signing the agreement."] [citations omitted] [emphasis added]; and *Skrbina v. Fleming Companies, Inc.* (1996) 45 Cal.App.4th 1353, 1368 [53 Cal.Rptr.2d 481, 490].) Here, a web provision that a person agrees that he or she is not forming a "confidential relationship" with Law Firm lacks the clarity that our alternative language provides and thus would be ineffective in negating Law Firm's confidentiality obligations.

disclaimers).) We note that by suggesting a means for lawyers to avoid inadvertently taking on a duty of confidentiality to web site visitors, we do not mean to suggest that this methodology is the only means for doing so. In the situation presented, however, Law Firm chose neither to make a plain-language reference to the non-confidential nature of communications submitted to its web site, nor to first screen visitors for potential conflicts with its existing clients. Having taken the course it did, Law Firm may be disqualified from representing Husband should the court conclude that the information Wife submitted was material to the resolution of the dissolution action.^{5/}

CONCLUSION

A lawyer may avoid incurring a duty of confidentiality to persons who seek legal services by visiting the lawyer's web site and disclose confidential information only if the lawyer's web site contains a statement in sufficiently plain language that any information submitted at the web site will not be confidential.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.

^{5/} We address in this opinion only whether the law firm has taken on a duty of confidentiality to the visitor. Disqualification in California is subject to rules established by case law, which we do not analyze in this opinion.