

Beware the Cocktail Party Client

Casual legal advice dispensed without reflection can lead to malpractice claim

BY PAMELA A. BRESNAHAN

"What do you think?" With those few words, legal advice may be innocently sought by a friend at a party or the neighbor across the street. Yet your answer could bring more discomfort than eating too many meatballs or a fight over borrowed power tools.

Casual advice given by a layperson has no legal ramifications. However, the same advice given by a lawyer may give rise to the first element necessary to establish a claim for legal malpractice—an attorney-client relationship.

Riskier Business

Although there are no statistics on the subject that this author could find, anecdotal evidence seems to suggest that advice given informally leads to more malpractice claims than advice that is given after an engagement agreement is signed.

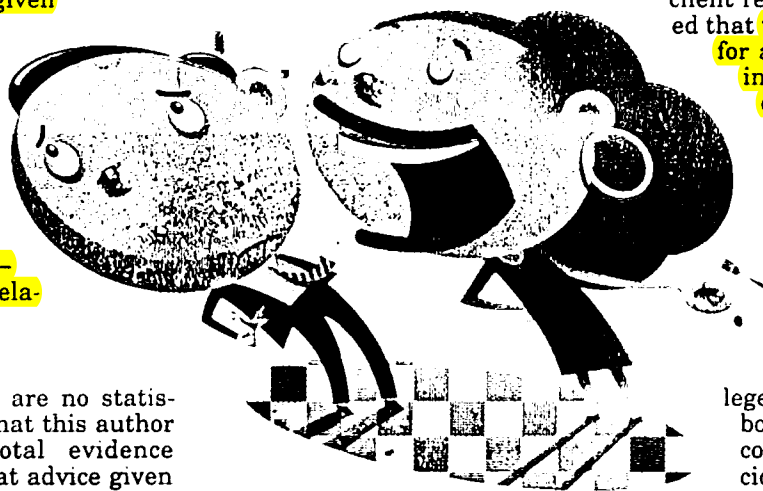
Putting the terms of the representation in writing gives you more time to reflect about whether to represent the client and, if so, what specific tasks you are competent and prepared to undertake for him.

What criteria should you have in mind in assessing whether to give informal advice to your cocktail party friend? What do courts look at in determining whether a lawyer has turned into a particular person's lawyer?

Most cases and commentaries analyzing the attorney-client relationship state that there must be some understanding between lawyer and client that the lawyer is going to give legal advice.

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As one case stated, "Whether a contract employing an attorney is expressed or implied, some indication that the advice and assistance of the attorney was sought and received is integral to the creation of the attorney-client relationship." *Carstensen v. Chrisland Corp.*, 442 S.W.2d 660 (1994), citing *Nicholson*



v. Shockey, 64 S.E.2d 813 (1951).

Further, it is equally clear that the relationship can be created even if the client does not sign a written agreement and does not pay a fee. These activities, of course, are indications that there is an attorney-client relationship. Also, just like in any other contractual situation, the intent of the parties is a relevant inquiry.

Generally, courts have found

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no attorney-client relationship in situations where contacts with the "wannabe client" are brief and fleeting. For instance, in *Farmer v. Mount Vernon Realty Inc.*, 983 F.2d 298 (1993), one of the plaintiffs alleged she had visited the defendant law firm and an unidentified attorney told her the firm would represent her. The trial court granted summary judgment for the law firm, and the District of Columbia Circuit U.S. Court of Appeals affirmed.

In a New Jersey case, a law firm that had no contact with the plaintiffs didn't win the malpractice suit against it until appeal. The plaintiffs had gone to a lawyer, who went to the defendant medical malpractice firm for advice on a wrongful birth cause of action.

On appeal, the New Jersey appellate court found no attorney-client relationship. The court stated that the attorney had not asked for an expert consultation but instead had inquired whether the firm was interested in taking the case. *Pocanik v. Cillo*, 543 A. 2d 987 (N.J. Super. Ct. App. Div. 1988).

There are some situations in which no attorney-client relationship has attached but the information learned from your friend is privileged. Therefore, you are duty bound not to disclose that confidence, even if you decide not to represent that person.

Advise, With Limitations

Clearly, as a lawyer, you have to be more careful than a non-lawyer in dispensing legal advice. In particular, if you are a transactional lawyer, don't give litigation advice. If you try cases, don't give tax advice. Instead of answering your friend's questions, you may want to refer him to someone who has expertise.

Don't let your sympathy for an acquaintance with little money to pay for a lawyer make you more prone to offer off-the-cuff advice. There is no "Good Samaritan" rule for lawyers. If you volunteer negligent advice, you are liable for it. And in this particular area of potential liability, be assured there are no points for helping out.

As one of my colleagues stated in a risk management seminar:

Please do not do involuntary pro bono work. Make a conscious choice as to whom you will be representing and what you will be doing in the course of that representation.