UNINTENDED ENGAGEMENTS: WHAT JUST HAPPENED?

CHRISTOPHER E. PARKER

You find an oversized envelope in your mailbox. You open the envelope and immediately recognize it contains a complaint. On further review, you notice that, much to your disappointment, your name appears as a defendant. As soon as the initial panic subsides, you look at the name of the plaintiff and cannot make a connection in your memory bank. A reading of the complaint reveals (much to your consternation) that it is an action charging you with legal malpractice. As you struggle to come to grips with how anyone could make such an allegation, you read further and see that the allegations point to your failure to file a lawsuit in a timely manner.

You quickly look through your contacts, searching for the name of the plaintiff. Even though the plaintiff is not one of your regular clients, surely the person would be someone with whom you've had *some* substantive encounter in the past. Unable to make a connection, you delve further. As you read on, you realize that the plaintiff was someone who had sent you an e-mail in response to finding your name through in an Internet search for a lawyer. Your firm's slick (but tasteful) website prominently describes your expertise as a seasoned litigator, unafraid to take on a big case and to champion a great cause. The website provides all your contact information, including your e-mail address and a general link through which interested parties can contact your firm for further information. After spending well over an hour searching through your files for some form of communication with the plaintiff, you finally bring in your firm's information technology (IT) consultant for help. A short time later, the IT consultant contacts you and says she's found an e-mail from the plaintiff and forwards it to your attention. You read the e-mail and quickly realize that it was sent to you with the indication that you had been identified through the Internet and that the plaintiff needed representation in a routine personal injury case.

You quickly pick up the phone and ask the IT consultant if she can locate your response. Certainly, you would have responded to this message and advised the sender that it was not your practice to accept work through unsolicited e-mails and that, if the individual seeking assistance would contact your office by telephone or in person, you would be happy to arrange a meeting, provided the potential representation did not pose a conflict for your or your law firm. Incredibly, the IT consultant cannot find your response but "helpfully" indicates that it appears the message sat in your inbox for two weeks before being deleted.

In other cases, you may simply field a telephone call from an individual who identifies himself as a referral from a colleague across town. The caller quickly identifies the

name of your colleague before launching into a lengthy monologue describing a current problem. It may be a potential claim against the caller's employer, dissatisfaction with a financial institution, a dispute with a local car dealer, or any of a number of potential problems. The call might come from a colleague who is attempting to bounce a problem he or she is having with a client.

Sometimes the encounters arise even more directly. You attend a monthly meeting of your local Chamber of Commerce. As you enter the meeting, you begin to mingle with a local business owner who knows you are a lawyer. During this relatively brief conversation, the business owner indicates that he may be in need of a lawyer and provides a quick glimpse of the problem his company is having with a customer across town. You give him a business card, tell him that the dispute sounds interesting and is right in your legal wheelhouse. As the meeting is about to start, you advise the business owner that you would be delighted to talk to him later about what sounds to be a great case, and you refer to a similar case you recently resolved to your client's advantage. Several days after this brief conversation, you receive a follow-up telephone call and, for the first time, you ask the business owner to identify all the potential parties. Much to your dismay, the potential defendant in the lawsuit that you have been discussing is a long-standing client of a new partner in your firm.

For many attorneys, in this age of burgeoning technology and open communications, these factual scenarios may prove to be somewhat uncomfortable. It is quite common for a busy attorney to receive an overwhelming number of e-mails each day, many of which are, undoubtedly, of little interest to a busy attorney, making it easy to overlook a message from an unknown party. However, some of these inquiries may come from potential clients seeking assistance on what, to them, is an important legal matter. They may have heard your name because of your clever and thoughtful marketing efforts or by simply thumbing through the telephone directory or performing an Internet search. Everyday communications are permeated with the reality that you are recognized as a lawyer with a unique set of skills and the ability to render competent advice. Each of these scenarios presents a potential land mine in the appropriate screening of conflicts of interest and the establishment of an attorney-client relationship, along with the full host of obligations that arise as a result.

Rules relating to the inception of the attorney-client relationship vary by jurisdiction. According to the Restatement (Third) of the Law Governing Lawyers § 14 (2000):

> A relationship between a client and lawyer arising when: (1) 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's consent to do so; or (b) the lawyer fails to manifest a lack of consent to do so, 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.

Routine day-to-day communications and marketing efforts can be a trap for the unwary. Even in an economic downturn, clients are everywhere—some simply may be hiding in plain sight.[1]

ON THE ONE HAND, IT IS INCUMBENT UPON AN ATTORNEY TO MARKET HIS OR HER SERVICES IN AN EFFORT TO EARN A LIVELIHOOD. THE DESIRE TO MARKET ONE'S SERVICES, HOWEVER, MUST YIELD TO THE POTENTIAL INTERESTS OF OTHER CLIENTS AND TO THE NECESSITY OF CONTROLLING AND IDENTIFYING RELATIONSHIPS THAT WILL BIND OR OTHERWISE OBLIGATE THE CONSULTING ATTORNEY.

Establishing the attorney-client relationship can often be a subjective exercise, which presents inherent risks to the unwary lawyer. Attorneys should periodically review their own practices to assure uniformity in how clients are screened for potential conflicts and how engagements may be accepted. Many malpractice insurers can provide training and guidance specific to a lawyer's jurisdiction. Engagement letters and *dis*engagement letters are essential in any list of "best practices" for law firm management. Clients and potential clients must be provided clear guidance on the parameters of any services to be performed as well as when they should not expect to get legal representation. Attorneys consulting with colleagues should be aware that the topics discussed in their consultation may be shared with the ultimate client, possibly creating an expectation of an extended attorney-client relationship. Similarly, the consulting attorney may become a "client" of the attorney offering his or her input into a given situation.[2] Remember, when things head south, the desperate frequently reach in all directions to spread the blame and responsibility.

Even though the process of checking conflicts can seem to be arduous, its importance in protecting the attorney and his or her law firm from unwarranted and unintended conflicts of interest cannot be overstated. Prior to hearing the facts of any potential dispute, it is imperative for an attorney not only to initiate but also to *complete* a conflict check to assure that the rights of existing clients are not infringed. Even though some jurisdictions allow for the limited use of ethical walls,[3] the practice is not universal and may cause damage to long-standing relationships with clients. In the interest of collegiality, when discussing a situation with another attorney under circumstances in which a conflict check cannot be readily completed, it is best to speak in terms of hypotheticals and avoid the exchange of any information that would identify clients in a manner that would constitute a waiver of the attorney-client privilege and create an unintended extension of the attorney-client relationship.

Unsolicited requests for advice—whether they come up at a cocktail party, at a business meeting, or through electronic means—present unique problems for lawyers. On the one hand, it is incumbent upon an attorney to market his or her services in an effort to earn a livelihood. The desire to market one's services, however, must yield to the potential interests of other clients and to the necessity of controlling and identifying relationships that will bind or otherwise obligate the consulting attorney. Attorneys should exercise caution in engaging in any communications with potential clients relating to their personal legal affairs, especially in a casual setting. Indeed, such conversations are typically far more productive if they are allowed to occur in a more isolated circumstance so that the parties can focus on all issues relevant to the problem presented.

Law firms' websites that allow outside parties to seek information concerning the firm's services should provide a clear indication that a party posing a question or seeking legal advice is *not* creating an attorney-client relationship through the submission of an unsolicited form. The content of a website should encourage inquiries, not provide legal guidance or advice. Similarly, unsolicited electronic mail messages from parties who are not known to the attorney must be treated with some caution. The mere act of responding to an unsolicited e-mail not only confirms receipt of the message but also has the potential to convey an intent to engage in communication with the party who is seeking advice. The ability to create an attorney-client relationship under this scenario may differ by jurisdiction, but any response to unsolicited electronic mail messages should clearly indicate the proper methodology by which to seek legal assistance and the attorney's intention (or lack of intention) to create an attorney-client relationship. Even though a claim that an unsolicited e-mail inquiry may face an uphill battle as a basis for a malpractice action, having such a message sit in an attorney's computer inbox for a lengthy period of time opens the door to an argument that the consummation of representation was under active consideration by the lawyer. A better practice may be to send such message to your computer's spam or junk mail folders immediately.

The potential for unintended consequences to arise from routine communications abounds. With some forethought and diligence, however, attorneys can successfully navigate the obstacles. Conflict and engagement procedures work to the benefit of the attorney and the client if the process is followed with appropriate rigor. Be mindful of the traps and act accordingly. **TFL**

Christopher Parker is an attorney in the Atlanta office of Miller & Martin PLLC, where he is the chair of the firm's Labor and Employment Law Department. His practice focuses on the representation of management in employment law, labor relations, restrictive covenants, and intellectual property disputes. A former chair of the Federal Bar Association's Labor and Employment Law Section, Mr. Parker now serves as a section board member and is a member of the association's Ethics Committee. This article is intended to provide general information and should not be construed as legal advice. The views expressed are those of the author, not Miller & Martin PLLC or the Federal Bar Association.

Endnotes

[1]*See* Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913 (2005), for a more exhaustive treatment of unexpected client engagements.

[2]*See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997).

[3]*See* MODEL RULES OF PROF'L CONDUCT note 3, at R. 1.18 (2003).