



**IOWA STATE BAR ASSOCIATION
COMMITTEE ON
ETHICS AND PRACTICE GUIDELINES**

NICK CRITELLI, JD, CHAIRMAN,
317 SIXTH AVENUE
SUITE 950
DES MOINES, IA 50309
515.243.3122
NICK@CRITELLILAW.COM

DAN MOORE, JD. SIOUX CITY, IA
DAVE PHIPPS, JD. DES MOINES, IA
ERIC LAM, JD. CEDAR RAPIDS, IA
TIMOTHY SWEET, JD. REINBECK, IA

August 8, 2007

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
521 E. Locust
Des Moines, IA 50309

Re: Opinion No. 07-02
Communication from and with potential clients.
Rule 32:1.18 comment [2].

Dear Mr. Dinkla

We have been asked to advise regarding the application of comment 2 to the Iowa Rule of Professional Conduct 32:1.18 concerning duties to potential clients and when a lawyer may be disqualified from accepting engagement in matters adverse to the prospective client. The comment states:

[2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a))

In the matter at issue, counsel was contacted by and met with a potential client in a setting which gave rise to an expectation that counsel was willing to discuss the possibility of forming a client-lawyer relationship. Clearly Rule 31:1.18 applied to the relationship.

However while in the process of determining whether to accept the case, counsel received unsolicited e-mail correspondence from the potential adverse party requesting representation and supplying the lawyer with what would otherwise be considered confidential information. Counsel had no prior relationship with the potential adverse party nor did the lawyer engage in public marketing that suggested the adverse party could unilaterally disclose factual information to the lawyer with a concomitant expectation of confidentiality. Clearly this is the type of situation that is envisioned by comment [2] and counsel would owe no professional duty to the communicant. The information voluntarily transmitted would not be considered confidential.

While the above scenario would seem fairly straightforward we chose to issue a formal opinion and guidance to the Bar because of the hidden complexities in applying comment [2] in a business environment which relies heavily on the Internet and other forms of electronic communication for marketing.

Gone are the days when professional relationships began with an in person consultation. In today's fast paced business environment clients have many means to use to approach and give information to counsel in an attempt to secure the lawyer's services. Furthermore due to the pace of technological advancements any such list would soon be incomplete. However, recognizing that all issues regarding the application of comment [2] must be resolved on an *ad hoc* basis, certain guidelines can be suggested.

A close read of comment [2] reveals two requirements: unilateral communication in conjunction with a reasonable expectation that the lawyer would be willing to discuss the possibility of forming a client-lawyer relationship. For purposes of guidance we will address the latter requirement first for it is the easiest to consider.

Almost all public marketing involves a communication that the lawyer is available and willing to discuss the possibility of forming a client-relationship for to do otherwise would be counter-productive. Consequently resolution of comment [2] issues will usually revolve around an analysis of the first

requirement, that of unilateral communication.

Analysis of the unilateral communication requirement is in essence a search for bilateral communication. Did the lawyer say or do anything that enticed or prompted the potential client to contact the lawyer and transmit confidential communication. One could argue that all communication is bilateral because the very fact of the lawyer's marketing is an enticement or consent to contact. However the mere fact of a request to contact is not in itself a request for information. For example, a law firm that publishes its name, address and telephone number in the telephone directory invites the public to call. It does not, however suggest anything more. By using the term unilateral in conjunction with the second requirement of a reasonable expectation we believe comment [2] requires more broader definition. In essence the call and the all important aspect of the sharing of confidential information must be prompted by something more than mere lawyer contact details. Reasonable people do not share their confidential information with strangers unless there is an expectation of privacy. The focus of the inquiry is whether counsel did anything that would lead a reasonable person to believe that they were permitted to share confidential information and the confidentiality would be respected. While this focus is easily stated, it is difficult to apply.

Most individuals rightfully believe that what they tell and give a lawyer is confidential. The fact of the relationship itself proves the required level of expectation. In the normal sequence of events the relationship precedes the disclosure of information. Unfortunately in comment [2] situations the situation is often reversed requiring further scrutiny of the lawyer's conduct. For example, an Internet web page which markets the lawyer's services and gives contact details does not in and of itself support a claim that the lawyer somehow requested or consented to the sharing of confidential information. However, an Internet web page that is designed to allow a potential client to submit specific questions of law or fact to the lawyer for consideration would constitute bilateral communication with an expectation of confidentiality. A telephone voice mail message that simply ask the caller for their contact details would not in and of itself rise to the level of a bilateral communication but a message that encouraged the caller to leave a detailed message about their case could in some situations be considered bilateral.

In conclusion, we suggest that counsel consider the following factors in determining whether comment [2] is applicable:

1. Examine and identify all communication to the public in general and prospective client in particular to determine if it can be interpreted to create a reasonable expectation that the lawyer or law firm was willing to discuss the possibility of representation.

2. Determine if the lawyer or law firm did, said or published anything that would lead a reasonable person to believe that they could give or share factual or other confidential information with the lawyer without first meeting the lawyer and establishing a client-lawyer relationship.

If both factors are answered in the affirmative, the lawyer or law firm will not be able to claim the protection afforded by comment [2].

In fashioning their public marketing strategy, counsel may well wish to consider some form of notice from which would could be used to set the confidentiality expectation level of potential clients.

Very truly yours,

A handwritten signature in cursive script that reads "Nick Critelli".

Nick Critelli