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Trolling for Clients on the Web: Ninth Circuit Rules on Confidentiality of Web Contacts by Prospective Clients

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If a prospective client came to your office and filled out a paper questionnaire for you to review later in making a decision on whether to take a case, you'd probably say that the questionnaire was covered by the attorney-client privilege because the prospective client provided the information in the context of seeking possible legal representation. You might also say that even if the questionnaire included a disclaimer to the effect that simply receiving the information didn't necessarily mean that you'd take the case. The Ninth Circuit recently said just that. The twist is that instead of paper questionnaires filled out in a lawyer's office they were electronic questionnaires submitted on a law firm's web site.

Barton v. U.S. District Court for the Central District of California, 410 F3d 1104 (9th Cir 2005), was before the Ninth Circuit on a writ of mandamus from the district court in Los Angeles. The underlying litigation involved product liability claims by users of the prescription drug Paxil against its manufacturer, GlaxoSmithKline. The plaintiffs' firm had posted a questionnaire on its web site inviting potential claimants to relate their experiences with Paxil. The questionnaire included a disclaimer that the law firm was only agreeing to review the questionnaire responses and not necessarily take anyone on as a client.

Several claimants who submitted questionnaires did become clients of the firm in subsequent litigation. During discovery, GlaxoSmithKline sought the questionnaires completed by four of the plaintiffs whose trials were scheduled first for potential use in cross-examination. The district court agreed, ruling that the disclaimer of an attorney-client relationship rendered the questionnaires fair game. The Ninth Circuit reversed.

In doing so, the Ninth Circuit noted that California law is clear that communications between a lawyer and a prospective client fall within the attorney-client privilege: “Prospective clients’ communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer. Under [California law], ‘[t]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.’” 410 F3d at 1111 (citation omitted). The Ninth Circuit found that what the disclaimer disclaimed was the immediate formation of an attorney-client relationship, not a disclaimer of confidentiality. Therefore, the court concluded that the prospective clients who submitted the information were entitled to have their responses protected by the attorney-client privilege.

Although *Barton* was decided under California law, Oregon has recently moved to recognize duties to prospective clients. New RPC 1.18 deals specifically with a lawyer's duties to prospective clients. RPC 1.18(b) includes a duty of confidentiality for information provided to a lawyer by a prospective client. And even before the new RPCs went into effect this past January, the Oregon Supreme Court in *In re Spencer*, 335 Or 71, 58 P3d 228 (2002), had recognized that prospective clients have a right to expect that their conversations with a lawyer about the possibility of representation will remain confidential. In reaching its decision, the Supreme Court relied in part on OEC 503(1)(a), which defines a "client" broadly for purposes of the attorney-client privilege to include a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer."

Barton serves as a reminder that although we increasingly communicate electronically many of the same principles developed for paper communications still apply.

ABOUT THE AUTHOR

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