

By Paul Tremblay

Forming Involuntary Client Relationships



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Imagine: After you have addressed a group of seniors at the Council on Aging about cutting-edge elder law topics, a well-dressed woman stands and tells you that her son prepared papers for her to sign that will transfer her family home into her son's name to protect her against future nursing home obligations. She asks you whether she should sign the papers tomorrow. You tell her that she's a wise and generous woman, and that's precisely what she should do. Of course, as you soon realize, your advice was terribly wrong, if only because it misunderstood how your state's Medicaid rules work.

Or imagine: Your e-mail this morning includes a message from a local merchant. The merchant asks you to represent her in a commercial dispute with a local lender. The merchant doesn't spare any details, including her frank thoughts about the lender and the dispute. When you ask around the

firm about this potential case, you discover that a partner is already representing the lender in this very dispute.

Are either of these women your client because of these interactions? Would it matter if she is your client?

These questions have significant implications for lawyers. In light of a recent Massachusetts Bar Association (MBA) ethics opinion and a Supreme Judicial Court (SJC) advisory committee's decision declining to adopt an American Bar Association (ABA) Model Rule covering this topic, lawyers in Massachusetts must be especially careful when interacting with persons who are not yet, but perhaps wish to be, formal clients.

Much turns on whether either woman is your client. If the well-dressed elder is your client, then you have committed serious malpractice, for which

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On further review, the SJC reinstated the conviction, agreeing that the "seizure" did not occur until the police declared their intent to conduct a frisk but holding that the police then possessed a reasonable suspicion of criminal activity. Because the defendant's conduct was consistent with non-criminal behavior, the Court acknowledged the question was close but ruled "[s]eemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry." In so holding, the Court accorded greater deference to police testimony that the area had experienced "a recent increase in incidents of firearm violence" and that police reaction to the defendant's distinctive walk was proper because it "was not a mere hunch, but was the result of the application of their experience and training at the police academy to their detailed observations of the defendant." Unlike the Appeals Court, the SJC found the defendant's continuing effort to conceal his right side from view gave rise to an actionable suspicion that his probable possession of a firearm was unlawful rather than lawful.

DePeiza illustrates that a police officer's ability to articulate and explain his observations and actions in a credible manner can make the difference in the outcome. Prosecutors and defense counsel, however, should request from police the back-up data regarding the nature of the specific location in which the stop occurred, the temporal proximity and similarity of other crimes in that area, and the prior experiences of the particular officer in relation to the observed conduct at issue. Under *DePeiza*, a properly-prepared officer's training and experience can carry the day but only if the Commonwealth lays a specific foundation supporting them. ■

Case Focus provides a timely, in depth, expert review of a new decision — federal, state, administrative — of particular importance, or practice area specific. The analysis focuses on the impact on prior case law or statutory interpretation, the complexities/gray areas of the opinion and what practitioners need to know about the effect the opinion has on their practice.

you may be liable. If the e-mailing merchant is your client, then you and your firm likely have a disqualifying conflict of interest, costing your firm an important client.

Two distinct questions arise: (1) how an attorney-client relationship is formed in Massachusetts, and (2) how information learned from a prospective client affects a lawyer's duties to that prospective client and to her other clients.

Forming an Attorney-Client Relationship

An attorney-client relationship exists by implication "when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *DeVaux v. Am. Home Assurance Co.*, 387 Mass. 814, 817-818 (1983). To prevent individuals from becoming inadvertent "clients," a lawyer must assure that conversations with potential clients do not amount to *advice*. The critical distinction will always turn on how specific and tailored the information is. To avoid that risk in a situation such as a seminar, the lawyer must make clear in her remarks that she is not providing individualized answers to any attendee's questions. *See, e.g.*, D.C. Bar Legal Ethics Comm. Op. 316 (2002).

Information from Prospective Clients

In the e-mail scenario, you have not formed an attorney-client relationship with the merchant, in light of *DeVaux*. You have not offered any advice to the merchant. But you have learned valuable information from an individual who might qualify as a *prospective* client. A lawyer owes a duty to protect information learned from a prospective client, even if that person does not become an actual client.

If you have "agreed to consider" the merchant as a possible new client, then you must protect the information she communicates to you, according to a recent MBA ethics committee opinion, MBA Op. 2007-1. If you have not "agreed to consider" her as a prospective client, then her unilateral sharing of information with you was at her peril, and you have no obligation to keep it secret. If your website invites prospective clients to contact your firm, then the merchant ought to be deemed a prospective client absent a clear disclaimer. With a clear disclaimer, the merchant cannot expect confidentiality after her unilateral submission of information to you by e-mail.

If the merchant is a prospective client, and communicated important information relating to your client the lender, then you should be disqualified from representing the lender in its dispute with the merchant. Then, under Mass. R. Prof. C. 1.10, your entire firm is disqualified. Massachusetts does not permit screening to allow your partner to continue to represent the lender after your disqualification. If the merchant shared only unimportant information, then you should not be disqualified, according to the MBA opinion. *See* MBA Op. 2007-01.

A new ABA Model Rule would clarify the obligations of lawyers interacting with prospective clients, but the SJC's Standing Advisory Committee on the Rules of Professional Conduct has opposed its adoption. Model Rule 1.18 disqualifies from adverse representation only those lawyers who learn "significantly harmful information" from a prospective client, and excludes from the definition of "prospective clients" those who "unilaterally" communicate information to a lawyer. It would also permit a law firm to continue or accept the adverse representation if the lawyer who learned the significantly harmful information were screened from participation in the case. It is a sensible rule that seems to be working well in other jurisdictions. The SJC should adopt it.

Disclaimer Strategy

The MBA opinion confirms that if your law firm's website does not have adequate disclaimers, then the merchant could become your prospective client and disqualify you and your firm from representing the lender. Your disclaimer should inform the merchant that she cannot expect that information e-mailed to the firm will remain confidential, and that she cannot assume that your firm will not oppose her on the matter. The disclaimer should include a "clicked" assent before the sender can transmit an e-mail to the law firm. *See* David Hricik, *To Whom It May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-Mail from Prospective Clients*, 16 Prof. Law. 1 (No. 3 2005).

But there's a danger that a blanket disclaimer may result in a waiver of the attorney-client privilege. Instead, you might say that the person's information may not be held confidential if your firm does not accept the individual's case, and that the firm's review of the communication will not preclude the firm from representing an opposing interest. ■

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