

**DON'T JUST HIT SEND: UNSOLICITED E-MAIL AND THE
ATTORNEY-CLIENT RELATIONSHIP**

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I. INTRODUCTION

When the first personal computer appeared in a law office, the practice of law underwent a profound change. For the first time, lawyers had a way to intelligently manage, index, and archive the massive amount of data that crossed their desks on a daily basis. And in a dramatic contrast to earlier technological advances, lawyers were early adopters, and continue to be heavy users, of computers.¹ In the past decade, lawyers have also embraced the Internet and e-mail, transforming both into important tools in a modern law practice. E-mail, which allows communication with anyone at minimal cost, seems to have a special draw for attorneys and many have come to rely on it for communication with clients, partners, court clerks, and opposing attorneys, among others. But, as with the rapid growth in the use of the Internet in general, e-mail use by attorneys creates some legal uncertainty, especially in the area of applying old, non-Internet-based law to situations that arise online.² Lawyers have been slow to respond to the new (or potentially new) ethical dangers presented by the increasingly established medium of online communication. In short, it seems that while they have been quick to embrace the sweet of e-mail, lawyers have not spent much time thinking about the bitter. More specifically, it is not hard to imagine the following situation:

John Togstan enters a hospital in Minnesota for treatment of an aneurysm on his left carotid artery. During treatment, his brain is deprived of oxygen and he suffers permanent paralysis on his right side and is ultimately left unable to speak. Over a year later, John's wife Joan, after speaking with her former work supervisor about her hus-

1. See Louis M. Brown, *Emerging Changes in the Practice of Law*, 1978 UTAH L. REV. 599, 600 (1978). In a telling example, Brown imagines partners in nineteenth century law firms objecting to the use of typewriters because "there were no cases in the books upholding the legal validity of documents prepared on a typewriter." *Id.* Various articles recount the reluctance with which attorneys greeted the telephone. See, e.g., Colleen L. Rest, Note, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 CASE W. RES. L. REV. 309 (1998).

2. This is a subject receiving increased attention from legal scholars. See, e.g., Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996) (examining personal jurisdiction on the Internet); Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002) (rejecting a new framework to govern online standard-form contracts).

band's condition, decides to contact Jerry Miller, a friend of the supervisor and a local attorney. She finds the website for Miller's firm, on which his name and e-mail address are prominently displayed, and composes and sends an e-mail recounting her husband's medical problems and the events at the hospital during his treatment. Neither Miller nor his firm are experts in medical malpractice, but Miller, on receiving Togstan's e-mail, responds that he does not feel that the Togstans have a case and that he would speak with his partner to confirm. Miller never spoke with his partner about the Togstan matter and never contacted Mrs. Togstan again. Mrs. Togstan interprets Miller's comments to mean that Miller would contact her in the future if his opinion of the case changed, and when no further communication ensues, Mrs. Togstan decides that the firm has definitively reached the conclusion that there is no case. Over a year passes before Mrs. Togstan speaks to another attorney, at which time the statute of limitations for medical malpractice has long since expired. Mrs. Togstan's new attorney assures her that had she been more timely, she would have had an excellent case. Based on her e-mail exchange with Miller, Togstan sues for legal malpractice, claiming the exchange of e-mails, coupled with the advice given by Miller, created an implied attorney-client relationship. Has Miller committed malpractice?

The logical answer is "probably not," largely because few courts would find it reasonable for Mrs. Togstan to rely solely on advice given through e-mail. Yet, this thinly veiled hypothetical presents facts strikingly similar to an actual case in which the lawyer *was* found to have committed malpractice.³ It also demonstrates one of the great dangers for lawyers who operate on the Internet in any way, even by sending a presumably harmless response to an unsolicited e-mail: the ethical landscape is, at present, almost completely unknown. Could a reply to an unsolicited e-mail be likened to casual advice given at a cocktail party, which generally, but not always, is insufficient to establish an attorney-client relationship?⁴ Or can it be said that if the e-mail was the result of a potential client looking at the firm's website — which, after all, often serves primarily as an advertising vehicle for the firm⁵ — that the firm created an implied invitation to communicate confidential information?⁶ The law in this area is

3. The hypothetical is similar to the facts of *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980), where the Minnesota Supreme Court affirmed a finding of an implied attorney-client relationship based on a short interview between lawyer and client in the lawyer's office. *See infra* notes 50–60 and accompanying text.

4. *See* Pamela A. Bresnahan, *Beware the Cocktail Client*, 85 A.B.A.J. 80 (1999); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. c (2000) [hereinafter RESTATEMENT].

5. *See* David M. Adler, *A Lawyer's Guide for Internet Marketing*, 16 CBA REC. 34, 38–39 (2002).

6. *See* Arthur D. Burger, *When Small Talk Can Lead to a Conflict*, LEGAL TIMES, Nov. 27, 2000, at 23. One commentator goes further and states that :

not only unclear, it is entirely unaddressed.⁷ The connection between casual advice and an implied relationship is not merely academic, as implied relationships can create real problems for unsuspecting attorneys, involving everything from a conflict that would preclude representation of a current client to malpractice liability;⁸ a lawyer owes implied clients many of the same fiduciary duties owed to clients in more traditional relationships.⁹ Thus, the seemingly harmless thirty-second response to a question received through e-mail can result in lasting and unpleasant consequences.

Legal ethicists and lawyers in general are just beginning to struggle with questions involving the Internet's impact on the practice of law and legal ethics. Certainly many of the issues encountered in the coming years will be new and the uncertainty surrounding the development of the law has prompted lawyers to be overly cautious in their nascent efforts to ensure limited liability for their online interactions. It is unlikely, though, that a new paradigm is going to emerge such that traditional principles will have no application to activity conducted online. Courts are increasingly relying on precedent drawn from years of experience in the real world to solve problems in the virtual one.¹⁰ To date, the situation has very much been one of new wine in old bottles, and there is no reason to suspect it will not continue as such.

This Note examines the ethical issues, including attorney-client duties, surrounding unsolicited e-mails sent to attorneys. Part II discusses the traditional doctrine of the attorney-client relationship and how courts have shaped an attorney's duties to people who are not formally their clients. In Part III, the focus shifts to an examination of

[If] you have made it clear on your [w]eb site advertisement that you are soliciting clients or are interested in representing clients in similar matters, you may have invited the e-mail contact from the prospective client and thereby would be considered as having entered into an attorney-client relationship with the prospective client who contacts you by e-mail.

Dean R. Dietrich, *E-mail Contact May Impose Restrictions*, WIS. LAW., May 2003, at 26.

7. See generally Dietrich, *supra* note 6.

8. See *id.*

9. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (1986).

10. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (relying on trespass law to allow an online service provider to deny access to its network to a company sending unsolicited commercial e-mail); *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (relying on the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), as a foundation for establishing jurisdiction over activities committed on the Internet); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (analyzing infringing images on a website under traditional copyright principles). *But see Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (rejecting trespass to chattels for e-mails that neither damaged the recipient computer system nor impaired its functioning and finding that such e-mails did not constitute an actionable trespass to the computer system, because they did not interfere with possessor's use of, possession of, or any other legally protected interest in, the personal property itself).

e-mail itself and how an unsolicited e-mail could result in an implied relationship. Part IV looks at the effectiveness of the disclaimers of the attorney-client relationship that have become a standard part of contacting an attorney and/or receiving a response from one. Finally, Part V offers some suggestions on dealing with the liability associated with unsolicited e-mail and proposes some reforms of the Model Rules of Professional Conduct. This section argues that courts should imply an attorney-client relationship created through e-mail only in narrow circumstances in which it is objectively reasonable for the putative client to believe a relationship has formed and the client has actually relied on the advice given.

II. THE CONTOURS OF THE IMPLIED ATTORNEY-CLIENT RELATIONSHIP

A. *The Traditional Attorney-Client Relationship*

The attorney-client relationship can be both incredibly obvious and decidedly fuzzy. Many times, it is unmistakable: a client retains an attorney who makes an appearance on the client's behalf in court or at a contract negotiation. The attorney then submits a bill to the client for the time and effort expended.¹¹ Other times, though, the relationship has a more amorphous structure and hinges very much on the intent and expectation of the parties.¹² In one prominent case, the Seventh Circuit found an attorney-client relationship between the law firm that represented a trade group and the various corporations that composed the group — a relationship that, on the surface, appeared tenuous at best.¹³ In an era when clients routinely discuss their legal problems with multiple attorneys before making a final choice on representation,¹⁴ lawyers must be especially alert to the possibility that these relatively informal interactions could lead to a variety of duties (most notably the duty of confidentiality), if not a full attorney-client relationship. These “surprise clients” can ultimately result in a conflict of interest (because attorneys owe all clients a strict duty of loyalty)¹⁵ or even in malpractice liability.¹⁶ Despite the importance this relation-

11. See Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209, 210–11 (1986).

12. RESTATEMENT, *supra* note 4, § 14 cmt. c.

13. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978).

14. See generally Kenneth D. Agran, Note, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 GEO. J. LEGAL ETHICS 1307, 1308 (1996).

15. WOLFRAM, *supra* note 9, § 4.1 at 146.

16. N. Gregory Smith, *Surprise Clients*, 48 LA. B.J. 218 (Oct. 2000).

ship plays in legal malpractice actions,¹⁷ there remains no clear test or bright line for exactly when a prospective client becomes a client to which an attorney owes full fiduciary duties. Thus, attorneys must be careful in their dealings with both clients and non-clients and cognizant that the absence of a signed contract memorializing the terms of representation does not mean that an attorney-client relationship does not exist.

At its heart, the attorney-client relationship is one of contract: a lawyer is the client's agent and owes the client various fiduciary duties.¹⁸ One oft-cited formulation of the relationship is found in *Kurtenbach v. TeKippe*,¹⁹ where the Iowa Supreme Court stated that the "relationship is created 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."²⁰ The Restatement takes a similar approach, finding that:

A relationship of client and lawyer arises when:

(1) a 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 consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.²¹

The comment to the Restatement indicates that the client's intent can be explicit, as when the client specifically requests services from a lawyer, or implicit, as when the client ratifies the lawyer's acts.²² Explicit representation is the type of agreement most people associate with an attorney-client relationship, in that the client has affirmatively reached out for the lawyer's assistance and the lawyer has agreed to provide such assistance. Once this relationship is formed, the lawyer

17. See Friedman, *supra* note 11, at 210.

18. RONALD D. ROTUNDA, LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 3-1.1 (2d ed. 2002-2003).

19. 260 N.W.2d 53 (Iowa 1977).

20. *Id.* at 56 (citing *Anderson v. Lundt*, 206 N.W. 657 (Iowa 1925)).

21. RESTATEMENT, *supra* note 4, § 14.

22. *Id.* cmt. c.

is ethically bound to keep the client's confidences and represent the client with undivided loyalty, among other things.²³ Because explicit and implicit relationships typically differ only in formality and not in the level of reliance placed on the attorney's advice by the client, implied relationships should not be viewed as somehow less valid from the start.

B. The Implied Attorney-Client Relationship

1. A Foundation of Equity and Reasonable Intent

It appears that no comprehensive study of the implied attorney-client relationship exists, probably because the relationship depends very much on what an individual court says it is.²⁴ If a consensus has emerged, it is that an attorney-client relationship, whether implied or in fact, arises when a person "seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on that advice."²⁵ Arguments that an attorney-client relationship should be implied from the circumstances surrounding the interaction between lawyer and client can be thought of as a type of equity action. In essence, the putative client is arguing that it was reasonable for her to rely on the attorney even though the two had entered no formal relationship.²⁶ Courts are not universal in embracing the idea that a mere request for legal advice, without more, is sufficient to begin a professional relationship, but those that have²⁷ should be of concern to lawyers responding to any request for legal advice, no matter what the setting.

On a broad level, courts have made it clear that there are times when a lawyer and client have a relationship sufficient to activate the ethical duties of the lawyer even in the absence of a formal agreement.²⁸ That is, payment for services or an agreement setting out fu-

23. Friedman, *supra* note 11, at 217.

24. See *Folly Farms I, Inc. v. Trs. Of the Clients' Sec. Trust Fund of the Bar of Md.*, 387 A.2d 248, 254 (1978) ("What constitutes an attorney-client relationship is a rather elusive concept."); Dietrich, *supra* note 6, at 26 ("[T]he attorney-client relationship is not clearly defined. . . .").

25. *Togstad v. Vesely*, 291 N.W.2d 686, 693 n.4 (Minn. 1980) (per curiam) (quoting Case Comment, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751, 759 (1979)).

26. See ROTUNDA, *supra* note 18, § 3-1.1

27. See, e.g., *Foulke v. Knuck*, 784 P.2d 723 (Ariz. Ct. App. 1989) (finding an attorney-client relationship and prohibiting representation where a lawyer seeking to divorce his wife met with another lawyer on a single occasion to discuss legal issues surrounding the divorce and the second lawyer later attempted to represent the wife); *Todd v. State*, 931 P.2d 721 (Nev. 1997) (finding a tacit agreement to render services where a lawyer, while visiting a client in prison, accepted a note from another inmate that detailed the (previously) non-client inmate's legal problems).

28. See Friedman, *supra* note 11, at 218.

ture compensation is not a threshold question in finding a relationship.²⁹ Instead, many courts and the Restatement adopt the approach that it is the intent of the client that primarily controls the activation of the relationship.³⁰ The Restatement provides that “the client’s intent [that a lawyer provide legal services to the client] may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer.”³¹ Put another way, the relationship can arise “by the implication of the actions of the attorney and the purported client.”³² As such, courts have found an attorney-client relationship even when the lawyer and client met only once for a short period,³³ when they never met in person,³⁴ or when the client never paid for the attorney’s services.³⁵ However, a relationship does not arise just because a client subjectively believes that an attorney with whom she is dealing has become her lawyer.³⁶ Rather, the belief must be objectively reasonable under the circumstances³⁷ and, if based on advice given by the attorney, it must be reasonable for the client to have relied on that advice.³⁸

2. The “Ethics 2000” Model Rules and Expansion of the Implied Relationship

The recently adopted “Ethics 2000” Model Rules of Professional Conduct have the potential to be highly influential in helping to define the true boundaries of the implied attorney-client relationship. Model Rule 1.18 provides that a “person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”³⁹ The rule goes on to provide that (1) a lawyer may not reveal information learned during a consultation with a prospective client⁴⁰ and (2) a lawyer is prohibited from representing

29. ROTUNDA, *supra* note 18, § 3-1.1

30. *See* RESTATEMENT, *supra* note 4, § 14 cmt. c; Friedman, *supra* note 11, at 218.

31. RESTATEMENT, *supra* note 4, § 14 cmt. c.

32. Friedman, *supra* note 11, at 218.

33. *See, e.g.*, Herbes v. Graham, 536 N.E.2d 164 (Ill. App. Ct. 1989) (finding an attorney-client relationship after a single ninety-minute conversation).

34. *See, e.g.*, Bays v. Theran, 639 N.E.2d 720 (Mass. 1994) (finding an attorney-client relationship from consultation only by mail and telephone).

35. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978).

36. *See* Brad Hunt, Comment, *Lawyers in Cyberspace: Legal Malpractice on Computer Bulletin Boards*, 1996 U. CHI. LEGAL F. 553, 559.

37. *See id.*

38. *See* Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 168-69 (1999).

39. MODEL RULES OF PROF'L CONDUCT R. 1.18, § a (2002) [hereinafter Ethics 2000 Model Rules].

40. *Id.* § b.

a client with interests adverse to the prospective client “in the same or a substantially related matter.”⁴¹ The comments to the rule indicate that a lawyer, during an initial interview, should attempt to get only as much information as is necessary from the client in order to decide whether to accept or reject the relationship.⁴² In addition, the comments also provide that information communicated unilaterally by a client without a reasonable expectation that the lawyer is willing to enter an attorney-client relationship does not, by itself, give rise to a prospective client relationship.⁴³ While the comments do state that prospective clients do not receive all of the protections afforded full clients,⁴⁴ it is unclear that this is relevant to the implied attorney-client relationship as discussed here, especially because a lawyer is always expected to give competent, informed advice.⁴⁵

Overall, the language of the rule appears to greatly expand the duty a lawyer owes to a prospective client; indeed, “this is the first time the ethics rules have recognized prospective clients and former prospective clients as a distinct group to whom lawyers owe distinct obligations.”⁴⁶ How great an expansion remains unclear. It is entirely possible that as these rules are adopted around the country, courts will begin to rely on this broad language of “prospective client duty” in deciding whether an attorney has fulfilled his obligations. It is also possible that courts will hew to a much tighter course and reject a significant duty expansion.

3. Expanding Duties to Implied Clients: The Application of the Implied Relationship

For at least the past twenty years, courts have engaged in a significant expansion of the attorney-client relationship.⁴⁷ Commentators are not united in their evaluation of what courts are doing: some have argued that courts are creating new duties to non-clients,⁴⁸ while others believe courts are not recognizing new duties so much as they are recognizing new ways of forming attorney-client relationships beyond the traditional bounds of strict privity.⁴⁹ The best example of this expansion, in which the mere request for advice created an attorney-client relationship, continues to be *Togstad v. Vesely, Otto, Miller, &*

41. *Id.* § c.

42. *See id.* cmt. 4.

43. *See id.* cmt. 2.

44. *Id.* cmt. 1.

45. *See id.* Rule 1.1.

46. Elizabeth Cohen, *The Less You Know*. . . , A.B.A. J., Dec. 2002, at 62.

47. *See* Friedman, *supra* note 11, at 217.

48. *See, e.g.,* Walter Probert & Robert A. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708 (1980).

49. Friedman, *supra* note 11, at 218.

Keefe.⁵⁰ In that case, Joan Togstad met with attorney Jerre Miller fourteen months after her husband suffered severe paralysis during treatment for an aneurysm.⁵¹ The meeting lasted “45 minutes to an hour,” after which Miller stated that he did not feel the Togstads had a case.⁵² The parties disputed whether Miller agreed to contact Mrs. Togstad after consultation with his partner, and whether he advised Mrs. Togstad of his firm’s lack of expertise in medical malpractice litigation.⁵³ After she heard nothing from Miller, Mrs. Togstad assumed Miller still felt there was no case and let the matter lapse.⁵⁴ More significantly, according to Mrs. Togstad, Miller never advised her of the two-year statute of limitations and never suggested she see another lawyer because of Miller’s lack of expertise in medical malpractice.⁵⁵ “No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.”⁵⁶

When Mrs. Togstad consulted another attorney a year after her meeting with Miller, the statute of limitations had already expired, thus barring any malpractice claim against the hospital.⁵⁷ The Togstads brought a legal malpractice action against Miller and his firm “on the theory that Mrs. Togstad sought legal advice and was given it; such advice created an attorney-client relationship and a legal duty; and, a breach resulted therefrom.”⁵⁸ The Minnesota Supreme Court agreed, finding that the “gist of plaintiffs’ claim is that Miller failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature.”⁵⁹ Because Mrs. Togstad relied on Miller’s advice, this failure to perform adequate research was the breach of duty from which the harm to the Togstads flowed.⁶⁰

Togstad continues to stand as the strongest pronouncement of an attorney’s duty to clients in implied attorney-client relationships. It “suggests that a request for legal advice about the merits of a particular claim may readily suffice to begin the process of forming an attorney-client relationship.”⁶¹ The case does not say, however, that any

50. 291 N.W.2d 686 (Minn. 1980).

51. *Id.* at 689–90.

52. *Id.* at 690.

53. *Id.*

54. *Id.*

55. *Id.* Miller disputed this account, claiming that he had told Mrs. Togstad that his firm was not well-versed in medical malpractice and that she should see another lawyer. *Id.* at 691.

56. *Id.* at 690.

57. *See id.*

58. Friedman, *supra* note 11, at 222; *see also Togstad*, 291 N.W.2d at 692.

59. *Togstad*, 291 N.W.2d at 693.

60. *See id.*

61. Lanctot, *supra* note 38, at 173.

advice given by an attorney automatically creates an attorney-client relationship. As the Restatement recognizes, “a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.”⁶² Other commentators agree: courts “have drawn a line of sorts between instances of casual, friendly, or social conversations, where no liability should arise, and more formal and serious occasions on which the lawyer could reasonably be understood to be applying or undertaking to apply the skills of a lawyer for the benefit of a client.”⁶³ The distinction seems to turn on the nature of the advice: if the lawyer is responding to a specific question or offering advice on specific facts, she is much closer to an implied attorney-client relationship because of the potential for reasonable reliance than if she is just answering a general question about the law.⁶⁴

4. Reasonableness: Content and Context⁶⁵

The objective reasonableness of the putative client's belief that the attorney has undertaken representation is almost certainly the most important aspect of finding an implied relationship.⁶⁶ Few would believe that an attorney is both consenting to a relationship and giving an informed response when answering a question posed at a cocktail party; a putative client who relies *solely* on that interaction in later claiming an implied relationship likely does so at her peril.⁶⁷ The situation is much different when the prospective client and attorney meet in the confines of the attorney's office during normal business hours — even if no fee is ultimately charged — and discuss the potential of a legal claim, as in *Togstad*.⁶⁸ Here, the client's reliance is significantly more justified (even if unreasonable to the attorney) and it is ultimately the client's reasonable understanding that will govern.⁶⁹ It appears that this is the distinction the Restatement is trying to draw

62. RESTATEMENT, *supra* note 4, § 14 cmt. c. Professor Lanctot criticizes the Restatement on this point, saying that the comment is “offhandedly announce[d]” and the “rationale is not explained, nor is a case cited for this proposition.” Lanctot, *supra* note 38, at 177.

63. WOLFRAM, *supra* note 9, § 6.6.2, at 210 n.54.

64. See Catherine J. Lanctot, *Regulating Legal Advice in Cyberspace*, 16 ST. JOHN'S J. LEGAL COMMENT. 569, 573–74 (2002).

65. This discussion owes much to the comments of Professor Bradley Wendel.

66. See Hunt, *supra* note 36, at 559.

67. See Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 183 (“To create an attorney-client relationship . . . the lawyer's advice must be specific to the facts of the putative client's case.”). It is hard to say that advice, given quickly in a social setting, can meet that level of tailoring.

68. See Hunt, *supra* note 36, at 558.

69. See, e.g., Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 183; Keoseian v. Von Kaulbach, 707 F. Supp. 150, 152 (S.D.N.Y. 1989) (“In every situation where an attorney-client relationship has been found . . . the client's belief has some reasonable basis in fact.”).

(albeit without much clarity): that the reasonableness of the reliance will turn in large part on the context of the advice, rather than solely on the content of that advice. That is, the advice must be proffered in a situation — a context — in which reliance is reasonable. Cocktail parties are not such a situation and reliance on such advice comes close to being *per se* unreasonable, even if the attorney gives a detailed, fact-specific answer.

On the other hand, where the context makes reliance reasonable — such as when it is given in an attorney's office to a client there by appointment — it is much easier to say an implied relationship is created. One can use *Togstad* to illustrate this: the Minnesota Supreme Court would have had difficulty finding reasonable reliance by Mrs. Togstad had she recounted her story to attorney Miller at a cocktail party. In that situation, most questioners would realize that the attorney has had no time to research the question or even give it much thought. Those looking for advice are not so much looking for a correct response — the content — as they are a general direction for further efforts. In contrast, the formality of an office visit, even if the advice given is almost completely devoid of substance, makes reliance both expected and easier to understand. In both situations, content plays a secondary role to the context of the advice in finding an attorney-client relationship. Of course, once the relationship is established, content moves to the forefront. In sum, the client's reliance on the advice must be objectively reasonable when looking both at the advice given and, more importantly, at the context in which the advice is given.

Prohibitions on the unauthorized practice of law provide a useful analogy. The appearance on behalf of another in a courtroom has historically been treated as constituting the practice of law, and cases have extended this to giving transactional advice and engaging in other non-court representation of clients.⁷⁰ In other words, courts have extended what constitutes the practice of law to encompass the full panoply of services lawyers now provide. Both the Restatement⁷¹ and the Model Rules⁷² prohibit the unauthorized practice of law, and it is probably safe to say that the practice of law occurs anytime the lawyer applies the law to the facts of a particular case.⁷³ According to the ABA, “the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer,” the essence of which is the lawyer's “educated ability to relate the general body and

70. See ROTUNDA, *supra* note 18, § 39-1.2.

71. See RESTATEMENT, *supra* note 4, § 4.

72. See Ethics 2000 Model Rules, *supra* note 39, R. 5.5.

73. See ROTUNDA, *supra* note 18, § 39-1.2.

philosophy of law to a specific legal problem of a client.”⁷⁴ Professor Rotunda provides a useful example:

While the lay investigator simply asks questions, or the paralegal conducts legal research, or the secretary prepares letters for the lawyer to sign, the lawyer is the person who applies the law to the facts; *viz.*, the lawyer decides when the cause of action lies more in tort than in contract, or whether research is useful, or whether to send a letter and what that letter should contain.⁷⁵

Thus, whenever the lawyer is engaged in the practice of law, it is, by definition, on behalf of a client, and she owes a duty to that client, even if the two have no formal relationship.⁷⁶ The duty may be as limited as confidentiality or as broad as a full fiduciary relationship.⁷⁷ What matters is not the extent of the duty but the duty in and of itself. It is the same when the attorney-client relationship is merely implied: on the margin, what matters is not what was said, but the context in which it was said. As long as the context engenders reasonable reliance, the attorney must ensure that he is providing competent, informed advice or risk malpractice liability.

One can take this a step further and tie it to the full attorney-client relationship: if the client is operating under the impression that she and the lawyer are in an attorney-client relationship, then the lawyer is no longer providing general advice; rather, the advice is tailored to the client's facts and reliance on that advice is reasonable. Rather than telling the client *what the law is*, the client believes that the lawyer is telling her *how the law relates to her particular situation*. Professor Lancot argues persuasively that giving “specific legal advice in response to a set of particular facts is the hallmark of the practice of law. . . . It is reasonable for a putative client to rely on advice that is specifically tailored to his particular request.”⁷⁸ Any attorney telling a client anything more than what the law is — the brief answer at a cocktail party — runs the risk of promoting reliance by the client. Finding the line between relaying what the law is and application of the law is increasingly difficult because e-mail makes communication so easy.

Finally, the justification for prohibiting the unauthorized practice of law, as with recognizing the implied attorney-client relationship in

74. MODEL CODE OF PROF'L RESPONSIBILITY EC3-5 (1980).

75. ROTUNDA, *supra* note 18, § 39-1.2.

76. *See id.*

77. *See generally* WOLFRAM, *supra* note 9, § 4.1 at 146.

78. Lancot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 183.

general, touches on a significant social interest: those who seek out attorneys in their professional capacity have a right to rely on the advice they receive, and attorneys should be on notice that they are required to provide a thoughtful, legally correct response in these situations.⁷⁹ Allowing anyone to give legal advice or allowing an attorney to escape liability for bad advice simply because the attorney and client were not in a formal relationship results in the same harm: a failure to penalize an off-the-cuff response to a legal inquiry which is ultimately relied on to the (potentially significant) detriment of others. Attorneys are consulted for their knowledge and must be careful to guard against dispensing that knowledge in inappropriate contexts.⁸⁰

C. *The Attorney-Client Relationship and Malpractice Liability*

The presence of an attorney-client relationship is a threshold question in legal malpractice actions because the relationship helps to establish the duty the attorney owes to the client.⁸¹ The relationship is primarily contractual,⁸² and this is the starting point for analysis. Under contract law, the injured party must prove the existence of an express or implied contract, a breach of that contract, and damages resulting from the breach.⁸³ The contract approach to the attorney-client relationship is most consistent with the Restatement's view.⁸⁴ Of course, as with contracts in general, the contract between an attorney and client need not be in writing.⁸⁵ Contract actions historically required strict privity between the lawyer and client,⁸⁶ and this has prompted some courts to search for alternate grounds for liability. Many settled on tort and its idea that circumstances could lead to one party owing a duty to another;⁸⁷ as a result, the line between tort and contract malpractice actions has blurred.⁸⁸ The attractiveness of this position for a court looking to find an implied attorney-client relationship is obvious: a court can attach liability without having to worry about privity or the presence of a contract.⁸⁹ A tort claim requires the

79. See WOLFRAM, *supra* note 9, § 4.1 at 145–46.

80. See Hunt, *supra* note 36, at 559–60.

81. Friedman, *supra* note 11, at 210.

82. See *id.* at 214.

83. Natacha D. Steimer, Note, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 GEO. WASH. L. REV. 332, 339 (1995).

84. See RESTATEMENT, *supra* note 4, § 14 (2000).

85. Friedman, *supra* note 11, at 218.

86. Steimer, *supra* note 83, at 339; see *Savings Bank v. Ward*, 100 U.S. 195, 200 (1879) (“Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist.”).

87. See Steimer, *supra* note 83, at 340–41.

88. See *id.* at 339.

89. See, e.g., *Ikuno v. Yip*, 912 F.2d 306, 313 (9th Cir. 1990) (stating that an attorney may owe a duty to a non-client under two distinct theories); *Pelham v. Griesheimer*, 440

plaintiff to show that the attorney owed a duty, the duty was breached, and the injury proximately resulted from the breach.⁹⁰ Under either theory, the essence of the claim is that the attorney “failed to use the ordinary skill expected of a lawyer and thereby proximately cause[d] damages to another person.”⁹¹ In recent years, the legal malpractice tide has again shifted and more courts are removing any distinction between fiduciary obligations traditionally arising from contract and professional negligence in favor of liability on a general negligence theory.⁹² Section 552 of the Restatement (Second) of Torts⁹³ and its broad duty language are also becoming an increasingly attractive option for courts looking to attach liability to an attorney-client relationship that does not otherwise meet more formal requirements.⁹⁴

III. UNSOLICITED E-MAIL AND THE IMPLIED ATTORNEY-CLIENT RELATIONSHIP

E-mail presents a new challenge to those trying to divine the outer limits of the attorney-client relationship. This is especially true when the e-mail arrives unsolicited through a link on a law firm’s website or a locator service like Martindale Hubble’s Lawyers.com.⁹⁵ One can easily imagine an attorney’s inbox stuffed with hundreds if not thousands of messages from putative clients detailing their legal woes if the attorney appeared on the evening news after a large jury verdict in her client’s favor. If the attorney reads any of these often highly fact-specific e-mails, does the mere act of reading these messages create

N.E.2d 96, 99 (Ill. 1982) (“[P]rivacy is not an indispensable prerequisite to establishing a duty of care between a non-client and an attorney in a suit for legal malpractice.”).

90. Steimer, *supra* note 83, at 340.

91. Hunt, *supra* note 36, at 557.

92. See Friedman, *supra* note 11, at 217.

93. Section 552 provides that :

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT (SECOND) OF TORTS § 552 (2003).

94. Section 552 is based around the idea that “the recipient [of information] is entitled to expect that such investigations as are necessary will be carefully made and that his informant will have normal business or professional competence to form an intelligent judgment upon the data obtained.” *Id.* cmt. e. The duty of care attaches because an attorney can foresee reliance on the advice he provides. See Steimer, *supra* note 83, at 346. Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987), is one case that holds an attorney liable for malpractice based, at least in part, on section 552.

95. See Lawyers.com, at <http://www.lawyers.com> (last visited Mar. 11, 2004).

an implied attorney-client relationship with the sender?⁹⁶ Or is the relationship only created if the attorney responds to the e-mail? And what if the response is of the general “please call my office for an appointment” variety — is even that enough for a relationship?

A. Case Law

No case has directly dealt with the issue of an attorney-client relationship created solely through e-mail, but *Knigge v. Corvese*⁹⁷ may provide a glimpse into how courts might handle relationships created through technology. In the case, a father, Brian Corvese, during a contested divorce and without consent of the mother, took the couple’s daughter from the Netherlands to the United States.⁹⁸ Prior to taking the child, Mr. Corvese left several voice mail messages with William M. Hilton, an attorney in California and a recognized expert on the Hague Convention on the Civil Aspects of International Child Abduction.⁹⁹ Hilton conducted his practice almost entirely through voice mail and Corvese ultimately left six voice mail messages for Hilton requesting assistance.¹⁰⁰ Hilton did not respond to any of the voice mail messages, nor did he respond to any of the several e-mails sent by Corvese.¹⁰¹ When the mother’s attorney later began to use Hilton for advice, Corvese moved to disqualify the attorney and enjoin Hilton from the instant proceeding based on an attorney-client relationship formed through the voice mail and e-mail messages.¹⁰² Recognizing that the formation of an attorney-client relationship “hinges” on a client’s reasonable belief that the client is consulting the attorney for professional advice,¹⁰³ the court nonetheless rejected the motion, stating that “Corvese could have had no reasonable belief that an attorney-client relationship existed or was created through his unilateral decision to leave a voice mail message.”¹⁰⁴ The court did note the lack of formality associated with the request for advice, stating that “[t]elephone advice is not the traditional method of providing

96. This is not as absurd as it might sound. In *Todd v. State*, 931 P.2d 721 (Nev. 1997), the Nevada Supreme Court found that a lawyer, while visiting a client in prison, agreed to a relationship when he accepted and read a note from another inmate that detailed the inmate’s legal problems.

97. No. 01 Civ. 5743, 2001 U.S. Dist LEXIS 10254 (S.D.N.Y. July 23, 2001).

98. *Id.* at *1.

99. *Id.* at *2-4.

100. *Id.* at *3-4.

101. *Id.* at *3-5. The court noted that Hilton deleted all e-mail messages from Corvese without reading them. *Id.* at *5.

102. *Id.* at *2.

103. *Id.* at *7.

104. *Id.* at *9.

advice,”¹⁰⁵ but ultimately reaffirmed the established notion that formality is not a necessary element of an attorney-client relationship.¹⁰⁶

Knigge v. Corvese is most interesting because of the functional approach taken by the court in analyzing Corvese's contact with Hilton. One could read the attorney-client standard in New York broadly and find that any action by the client alone to secure legal advice is sufficient to establish a relationship.¹⁰⁷ Instead, the court relied on what could be termed the reasonable expectation of the parties.¹⁰⁸ It was almost per se unreasonable for Corvese to believe that Hilton was acting as his attorney in any way, even on a subjective level. After all, if the whole purpose behind consulting an attorney is to obtain the attorney's advice, a total lack of advice should not result in malpractice liability for the attorney. Granted, an unreturned voice mail is different from an attorney actually telling a putative client “I will not represent you,” but the lack of communication must count for something. It is easy to extend this logic to unsolicited e-mail: if the attorney receives an e-mail and does not respond, there should be no grounds for a reasonable belief by the putative client of the existence of an attorney-client relationship. This is true whether or not the attorney ever reads the e-mail. An attorney who reads an e-mail with detailed information probably has a duty to keep that information confidential,¹⁰⁹ and may, in some instances, be precluded from accepting a client on the opposite side of the litigation.¹¹⁰ That attorney has not, however, created an expectation in the client sufficient to justify finding an attorney-client relationship.

B. Ethics Opinions

1. State Bar of Arizona

Many state and local bar associations are beginning to address technology's impact on the legal profession through ethics opinions,

105. *Id.*

106. *Id.*

107. Under New York law, an attorney-client relationship “arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services.” *Priest v. Hennessy*, 409 N.E.2d 983, 986 (N.Y. 1980). There is no requirement, under this language at least, that the attorney actually *provide* advice; rather, the client simply needs to reach out to the attorney. The court in *Priest* cites N.Y. C.P.L.R. § 4503 for support, but this section deals with an attorney's duty of confidentiality and is geared toward an established attorney-client relationship.

108. See *Knigge*, 2001 U.S. Dist LEXIS 10254, at *10.

109. See John F. Sutton, Jr., *The Lawyer's Fiduciary Liabilities to Third Parties*, 37 S. TEX. L. REV. 1033, 1043–44 (1996). One author recommends not reading an e-mail once it becomes clear it is “unwanted communication.” Burger, *supra* note 6, at 23; see also *infra* Section III.B.1.

110. This preclusion should be applied with suspicion when it appears the putative client is trying to use e-mail as a sword rather than as a shield.

but the State Bar of Arizona is the only entity to directly pass on the formation of an attorney-client relationship through unsolicited e-mail.¹¹¹ The State Bar presents a hypothetical involving an employee of XYZ Company (“Employee”) who, believing that his managers are abusive and his workplace hostile, writes a letter to the Human Resources Department of the company but does not receive a satisfactory response.¹¹² Later, Employee finds the names of eleven employment lawyers with whom he has never met or spoken and e-mails them as a group indicating that he is looking for a lawyer to represent him against XYZ Company.¹¹³ A copy of the letter to the Human Resources Department is attached to each e-mail.¹¹⁴ One of the lawyers (“Outside Counsel”) receiving the e-mail is outside counsel for XYZ Company and questions whether he can forward the e-mail to the company or if it should be treated as confidential communication.¹¹⁵

In Arizona, an attorney-client relationship exists when it is shown “that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession.”¹¹⁶ The Ethics Committee concludes that because “no fee was paid, no consultation occurred, no advice was given, and no services were rendered by Outside Counsel,” Employee could have no reasonable belief that he was represented by Outside Counsel and thus no attorney-client relationship was formed.¹¹⁷ In addition, “Outside Counsel never agreed to consider forming a relationship,”¹¹⁸ and because the letter attached to the e-mail had already been divulged to XYZ Company, there was no legitimate expectation of confidentiality by Employee.¹¹⁹ It would appear that the position of the Committee is that unilateral contact by Employee, coupled with a lack of response from Outside Counsel, was not enough to form any reasonable expectation in Employee’s mind that he and Outside Counsel were in any sort of relationship.¹²⁰

111. See State Bar of Ariz. Comm. on Rules of Prof’l Conduct, Op. 02-04 (Sept. 2002), available at <http://www.azbar.org/EthicsOpinions/Data/02-04.pdf> (last visited Mar. 12, 2004) [hereinafter Arizona Ethics Opinion].

112. *Id.* at 1.

113. *Id.*

114. *Id.*

115. *Id.*

116. Matter of Petrie, 742 P.2d 796, 800 (Ariz. 1987).

117. Arizona Ethics Opinion, *supra* note 111, at 4.

118. *Id.*

119. *Id.* The Committee noted that Employee’s desire to find a plaintiff’s employment attorney to represent him against XYZ Company could be considered confidential but rejected treating it as such because Employee did not request that information be kept confidential and “generally delivered” the information to ten other attorneys. *Id.* “These facts do not suggest a legitimate expectation of confidentiality.” *Id.* This seems like a dangerous standard at best, and one wonders if the Committee’s analysis would change if Employee requested confidentiality, e-mailed the attorneys individually rather than as a group, or both.

120. See *id.*

The Committee does not address any duties owed by the other lawyers contacted by the employee, though the inference is that they also owe no duty, primarily because in a later portion of the opinion, dealing with the duty of confidentiality for information received in the unsolicited e-mail, the Committee states that if an attorney simply maintains an e-mail address, not extending the duty of confidentiality to unsolicited e-mail is consistent with Arizona ethics rules.¹²¹ The Committee does recognize that this might change if the e-mail was the result of contact initiated through a website and urges attorneys to use disclaimers to prevent the formation of a duty of confidentiality.¹²² This is similar to an unpublished opinion from the Tennessee Supreme Court Board of Professional Responsibility, which held that a lawyer may reply to an e-mail message asking for legal advice without violating Tennessee ethical rules.¹²³ This does not mean, however, that a reply will not lead to an attorney-client relationship.

The Arizona opinion's dissent criticizes the majority for placing too much emphasis on the contact occurring through e-mail, thus engendering a low level of confidentiality.¹²⁴ The dissent would treat the e-mail as a confidential communication,¹²⁵ finding it "quite reasonable, even from an objective point of view, that Employee would believe that his intent to sue XYZ Company was something he expected would be held in confidence."¹²⁶ Thus, any of the attorneys contacted, including Outside Counsel, would be bound to hold the communication in confidence.¹²⁷ The dissent also rejects the majority's notion that the manner of communication should play a role in the confidentiality calculus, stating that:

[The] majority apparently concluded that, if contact had been made [by telephone or in person] . . . , a more extensive "discussion" may have ensued between Employee and Outside Counsel Employee's intention to seek to retain an attorney to represent him/her in his/her dispute with XYZ Company is no less clearly communicated through e-mail than through a telephone conversation (even using

121. *See id.* at 7. Arizona Ethics Rule 1.6 is modeled after the ABA's Rule 1.6. *See Ethics 2000 Model Rules, supra* note 39, R. 1.6.

122. *See id.* The distinction is that a website is, in essence, advertising.

123. *See* Tenn. Advisory Ethics Op. 95-A-576 (1995) (unpublished).

124. Arizona Ethics Opinion, *supra* note 111, at 11.

125. *Id.* at 10.

126. *Id.* at 11.

127. *Id.*

voice mail), regular mail or even a face-to-face meeting.¹²⁸

This is strong language and certainly calls for strict confidentiality for almost any information received through e-mail. It is unclear if the dissent would have attorneys reached through unsolicited e-mail owe these clients further duties, though this seems somewhat unlikely.

2. Association of the Bar of the City of New York

The Association of the Bar of the City of New York has produced another ethics opinion addressing unsolicited e-mail.¹²⁹ There, the Bar addressed the receipt of an unsolicited e-mail from a putative client that contained confidential information about a potential dispute with one of the firm's current clients. The opinion found there to be a "vast difference" between this situation and one in which a lawyer *solicits* confidential information because the law firm did not "request or solicit the transmission to it of any confidential information by the prospective client."¹³⁰

The fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm's web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm's general availability to accept clients, which has been traditionally done through legal directories, such as Martindale Hubbell, and now is also routinely done through television, the print media and web sites on the Internet.¹³¹

The Bar ultimately concluded that the information should, however, be held in confidence and not used against the putative client.¹³²

128. *Id.*

129. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2001-1 (Mar. 2001), available at <http://209.232.208.156:8080/ethics/issues/files/newyork1.pdf> (last visited Mar. 12, 2004).

130. *Id.* at 4.

131. *Id.* at 3.

132. *Id.* at 7-8.

While not directly applicable to the topic of this note, this decision provides a good illustration of how one high-profile bar association treats unsolicited e-mail. It is not a stretch to say that unsolicited e-mail from a prospective client that does not prejudice a current client should be treated in much the same way; that is, as voluntary, unilateral, unsolicited communication by the client. Thus, assuming the attorney does not respond with anything more than general contact information for the firm (or does not respond at all), the prospective client would have no reasonable expectation that she was the firm's client sufficient to implicate an ethical duty.¹³³ One could make the argument, as did the dissent to the Arizona opinion, that the putative client does have a reasonable expectation of confidentiality,¹³⁴ especially when the e-mail was sent individually to a specific attorney.¹³⁵

C. Other Sources of the Implied Attorney-Client Relationship on the Internet

To date, there has been a fair amount of commentary on the potential for a lawyer to create an attorney-client relationship through posting an answer on various bulletin board services¹³⁶ on the Internet.¹³⁷ The general consensus is that if an attorney responds to a highly factual inquiry with specific advice, an attorney-client relationship is much more likely to be found than when only general advice is given.¹³⁸ This tracks the general response to new modes of dispensing advice over the past seventy years.

The organized bar has attempted since the 1930s to regulate the giving of specific legal advice in a variety of other contexts, such as radio and television call-in shows, newspaper advice columns, books,

133. See *supra* Part II.B.1.

134. See *supra* notes 124–28 and accompanying text.

135. The analysis probably changes if, as with the hypothetical in the Arizona Bar opinion, the e-mail is sent to several attorneys at once or sent to a general address at the firm. On this distinction, the Arizona majority has the better argument. See Arizona Ethics Opinion, *supra* note 111, at 4.

136. A bulletin board in Internet parlance is an “electronic notice board devoted to particular topics of discussion, where people can post and read messages about those subjects.” Hunt, *supra* note 36, at 553. It is not altogether surprising that these bulletin boards have received the initial attention of commentators because they extend back well over a decade and generally pre-date the Internet as it is known today. Original providers of online connections — Prodigy, CompuServe, and GENie, for example — used bulletin boards as one of the main selling points of their services, largely because they were quick to load over the slow dial-up connections that almost completely dominated early access to online networks.

137. See, e.g., Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice Over the Internet*, 14 GEO. J. LEGAL ETHICS 891 (2001); Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38; Hunt, *supra* note 36.

138. See Deady, *supra* note 137, at 901.

seminars, and 900-number telephone lines. In each instance, the bar has attempted to distinguish between the transmission of general legal knowledge, which it has viewed as permissible, and the presentation of specific legal advice tailored to an individual's particular problem, which it has treated as impermissible.¹³⁹

In light of the unsettled law in this area, the advice has generally been of the "be careful" variety.¹⁴⁰ Arizona Bar Opinion 97-4 recommends that lawyers not answer questions in "chat rooms" or "news groups" (both of which are analogous to bulletin boards) because of the inability to screen for a conflict with an existing client and the possibility that confidential information might be disclosed.¹⁴¹ But, just a few lines later, the opinion affirms an attorney's ability to distribute general information about the law.¹⁴² The question, obviously, is just where a judge or disciplinary committee will draw the line between general and specific.

The wrinkle in relying on ethics commentaries dealing with bulletin boards is that they may be influenced, in part, by the public nature of the medium. By design, posts on a bulletin board are available for anyone to view. One could argue that a layperson truly looking for legal advice will not rely as heavily on advice posted to a public forum, or that the reliance will not be objectively reasonable sufficient to meet the usual standard for an attorney-client relationship.¹⁴³ E-mail, on the other hand, tends to be much more personal — a private, one-on-one exchange between sender and recipient. It is much easier to say that an exchange of e-mails between putative client and attorney is significantly more confidential and much closer to the formalities involved in an office visit than is a posting on an Internet bulletin board. An e-mail reply, as with a face-to-face meeting, is (generally) directed to the sender of the e-mail only, whereas a reply to a post on a bulletin board is viewable by the original poster and anyone else who views the board. Alternatively, advice posted to a bulletin board might be considered inherently general in nature, in that there is no confidentiality and the lawyer is responding not so much for the bene-

139. Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 162. Note the similarity to the content/context distinction discussed earlier. *See supra* Part II.B.4.

140. E-mail from William Freivogel, Senior Vice President, Aon Risk Services, to Douglas Schnell (Apr. 21, 2003, 09:43:18 EDT) (on file with author).

141. State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 (April 1997), at 4, available at <http://www.azbar.org/EthicsOpinions/Data/97-04.pdf> (last visited Apr. 14, 2004).

142. *Id.* at 5.

143. *See* Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 176; *see also supra* Part II.B.4.

fit of the poster as she is for the benefit of everyone on the board, despite the fact that the response might take the form of a reply to a specific set of facts.¹⁴⁴ Bar opinions that allow lawyers to conduct seminars and respond to questions from the audience buttress this public/private distinction in the giving of legal advice.¹⁴⁵

D. Responding to Unsolicited E-mail: The (Possible) First Step in an Implied Relationship

The theme running through almost every bar or court opinion on a lawyer responding to a prospective client's request for advice is that providing general advice does not form an attorney-client relationship, while providing advice tailored to specific facts may (and probably does) form such a relationship.¹⁴⁶ The closer one gets to specific advice, the more likely the client is to believe that the lawyer has at least tacitly agreed to a relationship.¹⁴⁷ The language of the Restatement is directly relevant in this context: a putative client need only manifest an "intent that the lawyer provide legal services,"¹⁴⁸ and such a manifestation does not require a written contract between attorney and client.¹⁴⁹ Courts, even before the codification of the Restatement, agreed with this position.¹⁵⁰ There is no inherent reason why e-mail should be treated as analytically distinct from other advice contexts, especially given that courts do not rely on formalities in judging the existence of the relationship.

144. See generally Hunt, *supra* note 36, at 554–55. On this, one could liken it to student responses to a law professor's hypothetical in a class discussion: it could hardly be said that the students are giving anything more than general legal advice, despite the tailoring of the response to the individual facts.

145. See Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 232–36.

146. See *id.* at 177–78; see also *supra* Part II.B.4.

147. See Garret Glass & Kathleen Jackson, Note, *The Unauthorized Practice Of Law: The Internet, Alternative Dispute Resolution And Multidisciplinary Practices*, 14 GEO. J. LEGAL ETHICS 1195, 1196 (2001).

148. RESTATEMENT, *supra* note 4, § 14.

149. *Id.* cmt. c.

150. See, e.g., *In re Johore*, 49 B.R. 710 (Bankr. D. Haw. 1985). In this bankruptcy case, the court found an attorney-client relationship on the basis of an initial telephone call and a thirty-minute meeting between attorney and client. *Id.* at 712. The attorney reviewed confidential information and was told by the client to send a bill but never did so. *Id.* Citing approvingly from *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978), the court indicated that no formal arrangement between attorney and client was required for an attorney-client relationship to arise. *Id.* at 713.

IV. OPTING OUT: DISCLAIMERS AND THE IMPLIED ATTORNEY-CLIENT RELATIONSHIP

If one starts from the premise that an unsolicited e-mail can create an attorney-client relationship, the question then becomes how best to limit the unintentional creation of that relationship. Many lawyers use duty disclaimers, and it is hard to find a website for a law firm that does not contain a disclaimer of liability of some sort. These can range from the general¹⁵¹ to the much more specific¹⁵² and often purport to govern e-mail sent through a link on the site. Almost uniformly, they indicate that the information provided does not form an attorney-client relationship between the viewer and the law firm. A good example comes from the website of the law firm Testa, Hurwitz, & Thibeault:

The information contained in the Testa, Hurwitz & Thibeault, LLP web site is solely for informational purposes, does not create an attorney-client relationship, and does not in any way substitute for professional consultation and advice, generally or in a particular case. Readers should not act upon this information without seeking professional counsel. Except where noted, these materials have been prepared by Testa, Hurwitz & Thibeault, LLP's attorneys who generally are admitted to practice only in Massachusetts. Although we attempt to keep our web site as current and accurate as possible we have also included older, archived materials on our site. We cannot assure you that all the information will be applicable to your situation, accurate, complete, or up to date. Nor can we assure you that our web site always will be available or free of functional defects. We disclaim any and all liability in respect to actions

151. See, e.g., Latham & Watkins Online, Conditions of Use, available at <http://www.lw.com/conditionsofuse.asp> (last visited Mar. 12, 2004) (stating that "[a]lthough this web site may provide information concerning potential legal issues, it is not a substitute for legal advice from qualified counsel. You should not and are not authorized to rely on this web site as a source of legal advice. Your use of this site does not create any attorney-client relationship between you and Latham & Watkins").

152. King & Spalding, Copyright Notice & Disclaimer, available at http://www.kslaw.com/our_firm/Disclaimer.asp (last visited Mar. 12, 2004) (running 539 words and specifically designating an attorney as responsible for the website). This was once termed the "mother of all disclaimers" by one writer. Wendy R. Liebowitz, *The Sins of Law Firm Websites: Are Ethical, Dignified Sites Dull?*, NAT'L L.J., Aug. 18, 1997, at B6.

taken or not taken based on any of the contents of this web site.¹⁵³

Given this reliance on disclaimers, it is useful to analyze whether they are truly effective in putting the putative client on notice that a relationship is not formed based on an e-mail or the use of the site. Not surprisingly, opinions are mixed.

A. Disclaimers as Panacea

Those who support the use of disclaimers generally do so because they feel that the disclaimer makes reliance on advice given sufficiently unreasonable to break any potential attorney-client relationship.¹⁵⁴ In other words, by “employing a disclaimer that states that he is not entering into any lawyer-client relationship, an attorney would be explicitly negating any putative client’s reliance on him to provide representation.”¹⁵⁵ Such a disclaimer, according to proponents, should state that (1) “the information [provided by the attorney] . . . is not authoritative legal advice on which a person should rely, and (2) [the attorney is] not undertaking to represent any person by responding to that person’s questions.”¹⁵⁶ Assuming disclaimers are entirely valid, they are also simple: through a few magic words, attorneys are able to release themselves of any liability associated with advice that they provide through any sort of online presence.¹⁵⁷ In other words, if “an attorney uses a disclaimer stating that no one should rely on the information he provides, that disclaimer should preclude reasonably foreseeable reliance on the information.”¹⁵⁸

153. Testa Hurwitz & Thibault, Terms of Use and Privacy Notice, *available at* <http://www.tht.com/term.htm> (last visited Mar. 12, 2004).

154. *See* Hunt, *supra* note 36, at 564.

155. *Id.* at 564.

156. *Id.* at 561.

157. *See id.* at 562.

158. *Id.* at 564. There is also an egalitarian argument in favor of disclaimers: online legal advice is often seen as an important step in helping to meet the needs of millions of Americans who have viable legal claims but would not seek legal advice otherwise. *See* Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 156. There is little question that attorneys responding to queries on legal bulletin boards provide a valuable service in helping others understand their legal rights. *See id.* at 257–58. Allowing disclaimers to prevent the formation of an attorney-client relationship with its accompanying duties may prompt attorneys to continue to share their knowledge in these and other forums. *See* Hunt, *supra* note 36, at 564. To the extent disclaimers allow attorneys to fill this need, they may be found to be acceptable. Such an argument weighs strongly in favor of access to advice despite the impact of reliance on that advice.

B. Disclaimers as One Step in Limiting the Implied Attorney-Client Relationship

1. Commentary on Disclaimers

A more pragmatic view of disclaimers, and the view that enjoys considerably more support among commentators, is that they should compose only one part of an attorney's efforts to prevent the formation of unwanted attorney-client relationships.¹⁵⁹ Certainly, when read, disclaimers can provide adequate notice that an attorney does not consent to a relationship simply through receiving an e-mail. The problem is that disclaimers often go unread — or, perhaps more importantly, are not understood — by the general public.¹⁶⁰ It is hard to imagine an unsophisticated client actually understanding just what constitutes an “attorney-client relationship,” much less what that means in terms of the duties owed to the client by the attorney.¹⁶¹ In addition, individuals are sending e-mail to attorneys because they have legal questions. A detailed response from an attorney could reasonably create an impression in the mind of a putative client that the attorney has both consented to a relationship and has provided competent, informed advice.¹⁶² Though a disclaimer may “clear up some confusion with respect to e-mail recipients who receive very general advice, an attorney who answers a specific legal question would have a difficult time relying on a standard disclaimer to show that no attorney-client relationship exists”¹⁶³ because of this strong potential for reliance by unsophisticated clients. In addition, online disclaimers create special notice problems for clients because they can be easily missed or purposely avoided. This is a much different scenario from a client sitting across from an attorney who verbally disclaims any duties or requires the client to read and sign a disclaimer of certain duties before giving any advice.

There are also significant ethical limitations on an attorney's ability to use disclaimers. The Restatement allows for a lawyer and client to limit the duty a lawyer owes to the client provided that “(a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances.”¹⁶⁴ The comment to this section, however, says nothing about lawyers disclaiming all of their duties; indeed, the basic premise appears to be that the lawyer and client have already agreed to a relationship.¹⁶⁵ Although the comment

159. See Dietrich, *supra* note 6.

160. See Deady, *supra* note 137, at 900.

161. See Friedman, *supra* note 11, at 212–13.

162. See *id.*

163. Glass & Jackson, *supra* note 147, at 1197.

164. RESTATEMENT, *supra* note 4, § 19(1).

165. See *id.* cmts. a, b, c.

does reference all of the other Restatement sections dealing with attorney-client relationships, Section 14 is noticeably absent from this list.¹⁶⁶ One provision is especially striking in light of the discussion above: “[c]lients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer’s duty.”¹⁶⁷ Language like this almost begs a court to find an attorney has forced an odious disclaimer upon an unsophisticated client, and a court could invalidate the disclaimer on public policy or contract of adhesion grounds, exposing the attorney to malpractice liability.¹⁶⁸ Ultimately, the reader is left with the impression that the drafters of the Restatement view duty disclaimers as very much the exception rather than the rule and that such disclaimers should be used only in discrete, limited circumstances with sophisticated clients.¹⁶⁹

Finally, disclaimers implicate the Model Rules of Professional Conduct. Model Rule 1.8 provides that a lawyer may not limit malpractice liability to a client “unless the client is independently represented in making the agreement.”¹⁷⁰ The comment to the rule makes the ABA’s position even clearer: “[a]greements prospectively limiting a lawyer’s liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation.”¹⁷¹ This rule could be read to indicate that the disclaimers found on law firm websites are not only ineffective, but often in direct violation of the Model Rules. A better interpretation, though, is that Rule 1.8 is only activated when both parties are ready to enter a formal agreement. Reading the rule any other way would simply extend liability too far and prevent lawyers from even engaging in conflicts checks before meeting with prospective clients. More germane to this discussion, it is hard to imagine that an attorney would be liable for an ethical violation for disclaiming her ethical duties if she simply received an unsolicited e-mail through a website that purported to limit the attorney’s liability.

2. Disclaimers in Practice

Attorneys already use disclaimers in a number of areas. Most notably for the ethical issues discussed in this note, there is an increasing acceptance of disclaimers that limit the scope of an attorney’s repre-

166. *See id.* Section 14 deals with the formation of an attorney-client relationship. *See id.* § 14.

167. *Id.* § 19 cmt. b.

168. *See* Lancot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 193-94.

169. RESTATEMENT, *supra* note 4, § 19 cmt. b.

170. Ethics 2000 Model Rules, *supra* note 39, R. 1.8.

171. *Id.* cmt. 14.

sentation of a client, often to advice on discrete matters.¹⁷² Such disclaimers might provide, for example, that the attorney consents to a relationship only for the limited purpose of offering advice on the specific facts of the putative client's e-mail. Model Rule 1.2 makes a limitation of this sort permissible, and the comment seems to contemplate just this sort of scenario.¹⁷³ The specter of the distinction between general and specific advice haunts the comment's language, though, for it refers specifically to situations where the client is interested in "general" legal advice — advice that, by implication, is not necessarily tailored to the client's specific issues.¹⁷⁴ There is more than a bit of uncertainty over whether a detailed, fact-specific response would qualify under Rule 1.2 or whether the ABA was really contemplating a situation in which the client is, in essence, asking for the attorney to recount his personal experience on a particular legal issue.¹⁷⁵ Even setting aside the concern regarding just how specific an attorney can be when giving limited advice under Rule 1.2, an attorney still must provide representation that accords with the other Model Rules, specifically Rules 1.8 and 1.1.¹⁷⁶ In the end, Rule 1.2's permission to limit the scope of representation may do very little to protect an attorney who responds to a specific question with an uninformed answer, even if she has previously attempted to limit the scope of representation with a disclaimer.¹⁷⁷

Disclaimers may amount to a proposed contract between the attorney and the putative client,¹⁷⁸ requiring the client's assent to its terms.¹⁷⁹ Although courts have enforced contracts entered into online,¹⁸⁰ they continue to hold fast to the offline requirement of some form of affirmative assent. Disclaimers on law firm websites, however, typically do not involve any affirmative action by the user; indeed, the user may not even know of their existence. Thus, real questions exist as to the validity of such disclaimers in serving as effective and lawful liability insulators. *Specht v. Netscape Communica-*

172. See ROTUNDA, *supra* note 18, § 3-2.2.

173. See Ethics 2000 Model Rules, *supra* note 39, R. 1.2(c) and cmt. 7. The comment sets out the following hypothetical: "If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation." *Id.*

174. See *id.* R. 1.2 cmt. 7.

175. See *id.* R. 1.2(c) (stating that "the limitation must be reasonable under the circumstances").

176. See *id.* R. 1.2 cmt. 8. Rule 1.1 requires an attorney to provide competent representation at all times: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* R. 1.1.

177. See Ethics 2000 Model Rules, *supra* note 39, Rule 1.2 cmt 7.

178. Cf. ROTUNDA, *supra* note 18, § 3-2.2.

179. See *Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (noting that mutual manifestation of assent is "the touchstone of contract").

180. See, e.g., *Register.Com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

tions Corp. dealt with the enforcement of a software licensing agreement that did not require any affirmative action by those downloading the software.¹⁸¹ The license agreement appeared “in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.”¹⁸² The user could download the software without ever reading the license agreement or realizing that she was entering a formal contract.¹⁸³ The court concluded that this was insufficient for the formation of a contract because the user was never aware of and therefore never actually manifested assent to the terms of the license agreement.¹⁸⁴ This sort of license agreement, offered through a link on the webpage, has become known as a “browsewrap” agreement and may not be enforced by courts because of concerns over the lack of assent.¹⁸⁵ In contrast, *Specht* did endorse the use of “clickwrap” agreements that “present[] the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon.”¹⁸⁶ The court held that it is essential for such agreements to contain “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers.”¹⁸⁷

The emerging case law and commentary regarding online contracts has significant implications for disclaimers found on law firm websites. As with the agreement invalidated in *Specht*, the basic problem is that there is often no assent by the client to the terms of the disclaimer; in essence, these are the same “browsewrap” license agreements strongly criticized — and held invalid — for their inability to extract affirmative assent.¹⁸⁸ Thus, lawyers may need to move to a clickwrap model in which they extract some form of affirmative assent to the disclaimer.¹⁸⁹ The Texas firm of Baker Botts has implemented just such a procedure. Clicking on a link to send e-mail to an attorney generates the following message on the user’s screen:

181. 306 F.3d 17 (2d Cir. 2002).

182. *Id.* at 23.

183. *See id.*

184. *Id.* at 32.

185. *See* Ryan J. Casamiquela, Note, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 476 (2002). Some commentators feel that because browsewrap agreements do not meet the notice and assent principles of basic contract formation, they should not be enforced. *See* Melissa Robertson, Note, *Is Assent Still a Prerequisite for Contract Formation in Today's E-economy?*, 78 WASH. L. REV. 265, 296 (2003).

186. 306 F.3d at 22 n.4.

187. *Id.* at 35; *see* Casamiquela, *supra* note 185, at 484 (“Clicking an ‘I agree’ icon or click-checking an unchecked box often represents consumer assent.”).

188. *See Specht*, 306 F.3d at 39 (“[P]laintiffs did not assent” to the license agreement.).

189. *See* David Hricik, “*This is Not a Pipe*,” E-Ethics Vol. I, No. VI (Nov. 2001), available at <http://www.hricik.com/eethics/1.6.html> (last visited Apr. 7, 2004).

E-mail messages sent via the Internet are not necessarily secure. Please do not transmit any information that you wish to be confidential. In addition, you have not yet hired an attorney. In order to preserve and safeguard the relationships with our current clients, Baker Botts must go through certain formalities before agreeing to represent anyone on a particular matter. Until these formalities are complete, none of your communications sent using e-mail are privileged or confidential. Do not use the supplied e-mail interface to send any confidential information. Such information may be communicated at a later time after an attorney-client relationship has been established.¹⁹⁰

The user must then click a box labeled "OK" before she can actually send an e-mail to the attorney.¹⁹¹ Another Texas firm, Vinson & Elkins, uses a similar procedure.¹⁹² Legal ethicist David Hricik specifically endorses these clickwrap agreements, claiming they might be the only way to effectively enforce a disclaimer.¹⁹³ At the very least, clickwrap disclaimers move law firms significantly closer to agreements already upheld as valid contracts in roughly analogous online situations.

V. ADVANCING THE BALL: PROPOSED REFORM REGARDING UNSOLICITED E-MAIL

There is no question that e-mail will continue to grow in importance, both for attorneys and the public in general.¹⁹⁴ Many attorneys are actively turning to the Internet as a source of new clients and e-

190. Baker Botts LLP, Attorneys, Carolyn B. Southerland, *available at* <http://www.bakerbotts.com/attorneys/bio.asp?id=567> (last visited Mar. 10, 2004). To view the disclaimer, click on the link to e-mail the attorney, located under the picture in the upper left portion of the screen.

191. It is possible to avoid the disclaimer by cutting and pasting (or simply typing) the supplied e-mail address into an e-mail program, rather than clicking on the link. A truly risk-averse firm might consider hiding the e-mail address until the user has assented to the disclaimer.

192. Vinson & Elkins, Lawyer Database Search Results, Steven M. Abramowitz, *available at* http://www.velaw.com/lawyers/lawyer_detail.asp?H4AttyID=320923105# (last visited Mar. 10, 2004). To view the disclaimer, click on the link for the attorney's e-mail address.

193. See Hricik, *supra* note 189.

194. One analyst predicts there will be 60 billion e-mails sent per day by 2006, up from 31 billion in 2002. IDC, E-mail Usage to Exceed 60 Billion by 2006, According to IDC, *available at* http://www.findarticles.com/cf_dls/m4PRN/2002_Sept_26/92811005/print.jhtml (last visited Mar. 17, 2004).

mail plays a large role in that solicitation.¹⁹⁵ Because of uncertainty over the ethical implications of unsolicited e-mail, both the American Bar Association and the various state and local bar associations need to respond to the phenomenon of unsolicited e-mail and the implications it has for the attorney-client relationship. Despite the heavy reliance by law firms on disclaimers, they should not serve as the primary mechanism for limiting liability. Rather, changes to the Model Rules should make the formation of an attorney-client relationship clearer, eliminating the need for most disclaimers. This is not to say, however, that disclaimers, especially those that require affirmative acceptance, cannot serve a useful role in preventing the formation of unwanted relationships. What follows are some suggestions on fleshing out the ethical landscape of this emerging issue.

A. Unsolicited E-mail Should Never Form an Attorney-Client Relationship if the Attorney Does Not Respond

The best way to think of unsolicited e-mail is as the unilateral decision of a putative client to reach out to an attorney and seek the attorney's advice. If the attorney does not respond to that e-mail, an implied attorney-client relationship simply should not exist. Courts judge the existence of an attorney-client relationship based on the objectively reasonable belief of the client.¹⁹⁶ If the client has received no communication from the attorney, it is unreasonable for that client to later claim that she relied on the "advice" (or lack thereof) to her detriment. Put another way, the context of the situation makes reliance unreasonable. It could be argued that this proposition is so obvious that it does not warrant a formal opinion or inclusion in the Model Rules. Yet, leaving this question without a clear decision invites uncertainty from both attorneys and judges. Could a putative client claim that she relied on the lack of a response as an indication that she did not have a legal claim? It is not beyond the realm of possibility to see a court endorse such a view, especially if the attorney holds herself out as open to attracting clients through e-mail. To prevent such an outcome, Model Rule 1.18¹⁹⁷ or its comment should be amended to clarify the position that no response results in no ethical duties. This represents a repudiation of the few cases that hold that client contact is sufficient to begin an attorney-client relationship¹⁹⁸ and protects firms from having to resort to elaborate click-wrap agreements and

195. See Rosalind Resnick, *A Shingle in Cyberspace*, NAT'L L.J., Sept. 27, 1993, at A1.

196. See *supra* notes 36-38 and accompanying text.

197. See Ethics 2000 Model Rules, *supra* note 39, R. 1.18.

198. Cf. *DeVaux v. Am. Home Assur. Co.*, 444 N.E.2d 355 (Mass. 1983) (finding that a secretary who returned putative client's call, instructed client to take various actions, and then misfiled the client's letter could have created a sufficiently reasonable reliance interest to hold the firm liable when the statute of limitations on the client's action expired).

the corresponding need for a contract with anyone sending e-mail through the firm's website.

B. An Implied Relationship Should Remain Possible if an Attorney Makes a Substantive Response to an Unsolicited E-mail

A harder question is what to do when an attorney actually responds to a putative client's unsolicited e-mail. The constant desire for new business can make attorneys reluctant to foreclose e-mail as a potential source of new clients, especially because such e-mails are not altogether different from the more traditional phone inquiries of clients searching for an attorney. Here, the distinction between general and specific advice will prove most useful in shaping the ethical debate. An attorney who simply responds, "Please call my office to set up an appointment to discuss these issues further," should not create a reasonable expectation in the client that the attorney has either provided advice or will ultimately consent to a relationship.¹⁹⁹ In fact, that attorney has told the client nothing other than that she is interested in further discussions. No actual legal advice has been offered by the attorney sufficient to create a reliance interest in the client. Indeed, there is little difference between this scenario and an attorney who, in response to a legal question at a cocktail party, simply hands the questioner a business card and urges the questioner to contact the attorney at her office.²⁰⁰ As long as the response is general and devoid of client-specific legal advice, a disclaimer appended to the end of the e-mail stating that the lawyer does not yet consent to an attorney-client relationship is probably unnecessary.²⁰¹ Rule 1.18 or the comment should be amended to reflect this position, but, as when an attorney simply does not respond to an unsolicited e-mail, the obvious lack of liability may weigh against formal changes to the Rules.

An attorney who wishes to push things a bit further — perhaps by gathering more information through e-mail before deciding to invite the client into the office for a formal consultation — may wish to respond on a more substantive level. Here, the danger of an implied relationship is much more acute. The more an attorney converses with a client, the easier it is for the client to think of the attorney not just as a source of advice but as *her attorney*.²⁰² This is increasingly obvious if the attorney begins to offer advice in response to the putative client's e-mail. Now, the situation is much closer to what Professor Lanctot aptly termed the "heart of the practice of law": giving legal

199. Cf. ROTUNDA, *supra* note 18, § 3-1.1.

200. See RESTATEMENT, *supra* note 4, § 14 cmt. c.

201. That said, for the truly risk-averse, it cannot hurt.

202. Cf. ROTUNDA, *supra* note 18, § 3-1.1.

advice in response to a specific set of facts.²⁰³ Given the Restatement's position that a lawyer can manifest consent to an attorney-client relationship²⁰⁴ and the various opinions holding that a formalized relationship is not necessary,²⁰⁵ an attorney responding to an e-mail certainly need not respond "I will represent you" in order to create an attorney-client relationship.²⁰⁶ As such, the Model Rules should allow for an implied relationship in this context. Even if the attorney is operating under the benefit of a clickwrap disclaimer, the nature of the dialogue will probably be significantly more important to a court than the boilerplate legalese an unsophisticated client had to wade through to reach the attorney. Again, the client's reasonable reliance is the touchstone of any analysis.²⁰⁷

The distinction between general and specific advice, coupled with greater understanding of reasonable reliance based on context, must evolve as the most important elements in the formation of an attorney-client relationship through unsolicited e-mail. If an attorney responds to a question with general information about what the law is in a particular jurisdiction, such a response is probably not specific enough to create reasonable reliance by the client.²⁰⁸ For example, a criminal defense attorney could respond to an e-mail regarding the various penalties for murder by writing "in this state, the mandatory sentence for first-degree murder is twenty-five years to life." Assuming that is true, this is the same kind of information a client could gather by herself; she has simply chosen to ask an informed source. In contrast, if the advice is specific to a set of facts presented by the putative client, that probably is enough to create a reasonable reliance interest in the client. For example, if the attorney receives an e-mail about a slip-and-fall at a local department store and responds that she does not feel the client has a case, it is reasonable for the client to rely on that advice.²⁰⁹ This is not advice the client could gather on her own because it represents the attorney's informed opinion about the client's particular circumstance; in short, it is the attorney applying law to facts and the context is such that reliance is reasonable.²¹⁰

The Restatement made a significant contribution to the implied relationship debate when it recognized that giving general advice does

203. Lanctot, *Attorney-Client Relationships in Cyberspace*, *supra* note 38, at 193.

204. RESTATEMENT, *supra* note 4, § 14 cmt. e.

205. *See supra* notes 33–35 and accompanying text.

206. *See Deady*, *supra* note 137, at 898–99.

207. *See Hunt*, *supra* note 36, at 559.

208. This is especially true if the attorney accompanies that general statement with a request that the attorney and client meet in the near future for further discussions.

209. Here, it likely would not matter what the attorney said in an effort to disclaim an attorney-client relationship, because the information provided is so specific.

210. *See supra* Section II.B.4.

not amount to an attorney-client relationship.²¹¹ This point, however, needs significant clarification, perhaps through a change to Model Rule 1.18. The Rule should make it clear that general advice is not sufficient to generate duties to prospective clients, but that specific advice may — and probably does — create a full attorney-client relationship with all of the obligations that entails.²¹² A useful distinction between the two is whether the client could have discovered the information through a reasonably prudent search. Things like the statute of limitations on medical malpractice, penalties for various crimes, and whether consortium recovery is allowed in a particular jurisdiction do not involve any substantive knowledge or application of the law. As such, an attorney should be somewhat free to respond to e-mails, should she choose, that ask these types of questions without the threat of an implied relationship. When a client asks an attorney this sort of question, she is simply using the attorney as her research vessel. Questions that call for the application of law to facts — the heart of what attorneys do on a daily basis — generally cannot be answered by a trip to the library. Substantive knowledge and informed judgment are required to determine, for example, whether particular behavior is anticompetitive, whether particular conduct constitutes sexual harassment, or whether a particular medical malpractice claim is viable. An attorney answering these questions through e-mail is almost certainly creating an attorney-client relationship with the questioner because a court is likely to find reasonable reliance on the advice given. This goes beyond basic research and asks, in essence, for the attorney's legal opinion — which is, after all, what the practice of law is all about and why clients retain attorneys in the first place. That said, there should be no hard and fast rule prohibiting attorneys from responding to a putative client's e-mail, even if it is to provide specific advice. If an attorney wants to enter a relationship with a client based on an exchange of e-mails, she should be free to do so. The attorney needs to know, however, the contours of the ethical landscape.

VI. CONCLUSION

How does all this analysis apply to the hypothetical situation of “Jane Togstan” and “Jerry Miller”? Miller's response to Togstan's facts was, in essence, that he did not feel she and her husband had a case. Unfortunately for Miller, under the distinction between general and specific advice outlined above, and more particularly because of Mrs. Togstan's reasonable reliance on that advice, he has probably formed an attorney-client relationship with Mrs. Togstan and, as such,

211. See RESTATEMENT, *supra* note 4, § 14 cmt. c.

212. Prof. Lanctot shares this opinion. See Lanctot, *Regulating Legal Advice in Cyberspace*, *supra* note 64, at 573–74.

has failed to provide her with competent representation. He is guilty of malpractice under a jurisdiction that follows the *Togstad*²¹³ rule, and is probably in violation of his ethical duties in most other jurisdictions as well. At the very least, he has not lived up to his duties under the Restatement.²¹⁴

E-mail is a powerful tool that, like the telephone at the turn of the last century, is fundamentally altering the way lawyers practice law. One of its greatest benefits is that it can make communication between lawyers and clients quick, easy, and inexpensive, regardless of geography. With these benefits, though, come certain burdens. Attorneys must be on notice that the advice they provide might ultimately be relied on by the recipient and that courts are likely to search especially hard for a way to hold the attorney liable if they feel the client has suffered as a result of the attorney's negligence. Nevertheless, courts must remain conscious that a client's reliance must be objectively reasonable based on both content and context. It is unlikely that many courts would find reliance on advice offered through e-mail reasonable in all circumstances. Firms using elaborate disclaimers would be better served by stepping back and thinking critically about those few situations in which the advice offered by an attorney in an e-mail is so specific and so detailed that it could prompt reasonable reliance rather than devising ever more complex disclaimers.

Dispensing legal advice is not something lawyers should do flip-pantly, and a disclaimer on a website or attached to an e-mail is not, in and of itself, enough to insulate a lawyer from liability for bad advice. Perhaps even with clear rules on general and specific communications, lawyers should refrain from offering advice to prospective clients through e-mail because the temptation to skimp on research or gloss over important facts is simply too great in the absence of a questioning client. That said, some lawyers may find e-mail a useful tool in quickly getting acquainted with a prospective client's legal issue and may be willing to accept the ethical burdens in exchange for the time benefits. What lawyers unquestionably need is greater direction on just what activities can create an attorney-client relationship online.

213. *Togstad v. Vesely, Otto, Miller, & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).

214. See RESTATEMENT, *supra* note 4, § 16.