

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 95-0019**

ISSUE: Under what circumstances may a communication in a non-office setting by a person seeking legal services or advice from an attorney be entitled to protection as confidential client information when the attorney accepts no engagement, expresses no agreement as to confidentiality, and assumes no responsibility over any matter?

DIGEST: A person's communication made to an attorney in a non-office setting may result in the attorney's obligation to preserve the confidentiality of the communication if (1) an attorney-client relationship is created by the contact or (2) even if no attorney-client relationship is formed, the attorney's words or actions induce in the speaker a reasonable belief that the speaker is consulting the attorney, in confidence, in his professional capacity to retain the attorney or to obtain legal services or advice.

An attorney-client relationship, together with all the attendant duties a lawyer owes a client, including the duty of confidentiality, may be created by contract, either express or implied. In the case of an implied contract, the key inquiry is whether the speaker's belief that such a relationship was formed has been reasonably induced by the representations or conduct of the attorney. Factors to be considered in making a determination that such a relationship was formed include: whether the attorney volunteered his services to the speaker, whether the attorney agreed to investigate a matter and provide legal advice to the speaker about the matter's possible merits; whether the attorney previously represented the speaker; whether the speaker sought legal advice and the attorney provided that advice; and whether the speaker paid fees or other consideration to the attorney.

Even if no attorney-client relationship is created, an attorney is obligated to treat a communication as confidential if the speaker was seeking representation or legal advice and the totality of the circumstances, particularly the representations and conduct of the attorney, reasonably induces in the speaker the belief that the attorney is willing to be consulted by the speaker for the purpose of retaining the attorney or securing legal services or advice in his professional capacity, and the speaker has provided confidential information to the attorney in confidence.

Whether the attorney's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the speaker. The factual circumstances relevant to the existence of a consultation include: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

The obligation of confidentiality that arises from such a consultation prohibits the attorney from using or disclosing the confidential or secret information imparted, except with the consent of or for the benefit of the speaker. The attorney's obligation of confidentiality may also bar the attorney from accepting or continuing another representation without the speaker's consent. Unless the circumstances support a finding of a mutual willingness to such a consultation, however, no protection attaches to the communication and the attorney may reveal and use the information without restriction.

AUTHORITIES

INTERPRETED: Rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

Evidence Code sections 951, 952, and 954.

STATEMENT OF FACTS

Individuals with legal questions sometimes approach lawyers on a casual basis, in non-office settings, and in unexpected ways. We have been asked whether any of the following situations could result in the lawyer owing a duty of confidentiality to any of the individuals who approached him.

Situation 1: Jones, a complete stranger to Lawyer, approaches Lawyer in a main courthouse hallway and says, "Are you an attorney?" As soon as Lawyer replies, "yes", Jones continues: "Doe and I have been charged with two burglaries, but I did the first one alone. What should I do?" In response, Lawyer declines to represent Jones and suggests that Jones contact the public defender's office. Later, Doe seeks to hire Lawyer to defend him on the burglary charges to which Jones referred in his statement to Lawyer.

Situation 2: Smith approaches Lawyer at a party after learning from the host that Lawyer is an attorney. Smith has no idea of the area of law in which Lawyer practices. During casual conversation, Smith says, "My insurer won't provide coverage to replace my office roof even though my business flooded last year during a rain storm, and even though I have paid all the premiums. Do you think there's anything I can do about it?" Lawyer politely listens to Smith make that statement but as soon as Smith finishes, Lawyer tells Smith he is not in a position to advise Smith about his insurance situation. Later, Lawyer's existing insurance company client, InsuredCo, which insures Smith's business, assigns the defense of Smith's claim to Lawyer.

Situation 3: Lawyer receives a phone call at home from his Cousin. Cousin says, "Lawyer, I know you do legal work with wills and estates. Well, after Grandma died, I borrowed her car and wrecked it. Turns out the car wasn't insured. Do you think that will be a problem when her estate gets resolved? Should I do anything?" Lawyer listened without interrupting, and then told Cousin he could not represent him. He suggested that Cousin call a referral service for a lawyer. Later the family hired Lawyer to probate Grandma's estate, including obtaining compensation for the damaged automobile.

DISCUSSION

The three situations presented in the facts exemplify the kinds of communications that members of the public commonly direct to attorneys in non-office settings. We are asked to determine whether any of these situations result in Lawyer acquiring a duty to preserve the confidentiality of the information the speakers communicated to Lawyer.

In determining whether any of the three situations could give rise to a duty of confidentiality owed by Lawyer, we engage in a two-part analysis. First, we ask whether any of the situations result in the formation of an attorney-client relationship. If an attorney-client relationship is formed, either expressly or impliedly, then Lawyer owes the respective speaker all of the duties attendant upon that relationship, including the duty of confidentiality. Second, in the absence of an attorney-client relationship being formed, we still must ask whether Lawyer may nevertheless owe a duty of confidentiality to any of the speakers because Lawyer, by words or conduct, may have manifested a willingness to engage in a preliminary consultation for the purpose of providing legal advice or services, and confidential information was communicated to Lawyer.

I. If an attorney-client relationship exists, an attorney owes a duty of confidentiality to the clients.

Except in those situations where a court appoints an attorney, the attorney-client relationship is created by contract, either express or implied. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181 [98 Cal.Rptr. 837]; *Houston General Insurance Co. v. Superior Court* (1980) 108 Cal.App.3d 958, 964 [166 Cal.Rptr. 904]; *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22].) The distinction between express and implied-in-fact contracts “relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties.” *Responsible Citizens v. Superior Court (Askins)* (1993) 16 Cal.App.4th 1717, 1732 [20 Cal.Rptr.2d 756], quoting 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 11, p. 46.

In none of the situations presented in the facts did Lawyer express his assent to represent the speaker. Indeed, in each situation, Lawyer expressly declined to represent the speaker. In the absence of Lawyer’s express assent, no express attorney-client relationship exists.

Notwithstanding the absence of an express agreement between the parties, their conduct, in light of the totality of the circumstances, may nevertheless establish an implied-in-fact contract creating an attorney-client relationship. (Cf. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611 [176 Cal.Rptr. 824]; see *Kane, Kane & Kritzer, Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 40-42 [165 Cal.Rptr. 534]; *Miller v. Metzinger, supra*, 91 Cal.App.3d 31, 39-40.) (See also Civ. Code, § 1621 (“An implied contract is one, the existence and terms of which are manifested by conduct.”).) Neither a retainer nor a formal agreement is required to establish an implied attorney-client relationship. (*Farnham v. State Bar* (1976) 17 Cal.3d 605, 612 [131 Cal.Rptr. 534]; *Kane, Kane & Kritzer v. Altagen, supra*, 107 Cal.App.3d 36.)

Courts have considered a number of factors, including the following, in determining whether an implied-in-fact attorney-client relationship exists:

- Whether the attorney volunteered his or her services to a prospective client. (*See Miller v. Metzinger, supra*, 91 Cal.App.3d 31, 39);
- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case. (*See Miller v. Metzinger, supra*, 91 Cal.App.3d 31);
- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question. (*See Kane, Kane & Kritzer, Inc. v. Altagen, supra*, 107 Cal.App.3d 36, 40-42);
- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice. (*See Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [239 Cal.Rptr. 121]);
- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question. (*See Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]);
- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity. (*See Westinghouse Electric Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319).

The last listed factor is of particular relevance. One of the most important criteria for finding an implied-in-fact attorney-client relationship is the consulting individual’s expectation – as based on the appearance of the situation to a reasonable person in the individual’s position. (*Responsible Citizens v. Superior Court, supra*, 16 Cal.App.4th 1717, 1733. See also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281 n. 1 [36 Cal. Rpt. 2d 537]; [discussing the factual nature of the determination whether an attorney-client relationship has been formed] and *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship exists ultimately is

based on the objective evidence of the parties' conduct].) Although the subjective views of attorney and client may have some relevance, the test is ultimately an objective one. (*Sky Valley Limited Partnership v. ATX Sky Valley Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 652.) The presence or absence of one or more of the listed factors is not necessarily determinative. The existence of an attorney-client relationship is based upon the totality of the circumstances.

Before proceeding with our analysis of the particular facts presented, it is important to emphasize that not every contact with an attorney results in the formation of an attorney-client relationship. In a frequently cited case, the court found that it was not sufficient that the individuals asserting the existence of an attorney-client relationship "'thought' respondent was representing their interests because he was an attorney." (*Fox v. Pollack, supra*, 181 Cal.App.3d 954, 959.) The court noted that "they allege no evidentiary facts from which such a conclusion could reasonably be drawn. Their states of mind, *unless reasonably induced by representations or conduct of respondent*, are not sufficient to create the attorney-client relationship; they cannot establish it unilaterally." *Ibid.* [Emphasis added]. (See also *Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 504 [54 Cal.Rptr.2d 805].)

Situations 1, 2, and 3 do not appear to involve any of the foregoing factors. In none of the situations did Lawyer volunteer to provide legal services, agree to investigate, or offer any legal counsel, advice, or opinion. Nor is there any evidence that Lawyer had a prior professional relationship with any of the individuals. Moreover, none of the individuals provided any compensation or other consideration towards an engagement. Finally, Lawyer provided no comment on any of the individual's problems, other than to expressly decline to provide any assistance,^{1/} or to refer the individual to other resources for legal representation. Given those circumstances, none of the individuals who sought out Lawyer could have had a reasonable belief that Lawyer would either protect his or her interests or provide legal services in the future. Accordingly, we cannot conclude that an implied-in-fact attorney-client relationship was formed in any of the situations presented.^{2/}

II. Even in the absence of an attorney-client relationship, an attorney may owe a duty of confidentiality to individuals who consult the attorney in confidence.

In the first part of our analysis set out in section II, we concluded that none of the fact situations resulted in the formation of an attorney-client relationship. Thus, Lawyer does not owe any of the individuals *all* of the duties attendant upon that relationship. Nevertheless, even if an attorney-client relationship was not formed, it is still possible that Lawyer owes a duty of confidentiality to one or more of the individuals who sought him out because they have engaged in a confidential consultation with Lawyer's express or implied assent.

The second part of our analysis again focuses on the totality of circumstances surrounding each fact situation. Instead of evaluating those circumstances to determine whether the parties assented to the formation of an attorney-client relationship, however, we ask whether Lawyer evidenced, by words or conduct, a willingness to engage in a *confidential consultation* with any of the individuals. In making this determination, we first ask in section A of this part whether any of the individuals may be a "client" within the meaning of Evidence Code section 951. Second, assuming the individual is a "client," we inquire in section B whether the circumstances of the fact situation allow us to conclude that the communications between Lawyer and the individuals were confidential. (Evid. Code, §§ 952, 954.) Finally, in part III we discuss the ramifications of an affirmative answer to each of these first two questions.

^{1/} An attorney can avoid the formation of an attorney-client relationship by express actions or words. (See, e.g., *Fox v. Pollack, supra*, 181 Cal.App.3d 954, 959; *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney disclaimed attorney-client relationship in advance of discussion]; and *United States v. Amer. Soc. of Composers & Publishers, etc.* (S.D.N.Y. 2001) 129 F.Supp. 327, 335-40, *modified*, 2001 WL 261838 (3/14/01) [no attorney-client relationship formed between attorney for unincorporated association and its member, in part because the association's membership agreement said so and the member therefore could not have had a reasonable expectation to the contrary].)

^{2/} If an attorney-client relationship had been created, an attorney has two duties with regard to the handling of client information: the attorney-client privilege (Evid. Code, § 950, et seq.) and the duty of confidentiality (Bus. & Prof. Code, § 6068, subd. (e)).

A. A person is a “client” for the purposes of the attorney-client privilege and the lawyer’s duty of confidentiality if a lawyer’s conduct manifests a willingness, express or implied, to consult with the person in the lawyer’s professional capacity.

In California State Bar Formal Opinion Number 1984-84, we concluded that a person who consults with an attorney to retain the attorney is a “client,” not only for purposes of determining the applicability of the evidentiary attorney-client privilege under Evidence Code sections 950 et seq., but also for purposes of determining the existence and scope of the attorney’s ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e), and under former rule 4-101 of the Rules of Professional Conduct of the State Bar of California^{3/}, the precursor to rule 3-310(E).^{4/} In reaching that conclusion, our earlier opinion recognized that the duty of confidentiality and the evidentiary privilege share the same basic policy foundation: to encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients’ interests. Accordingly, we relied in part on the definition of “client” in Evidence Code section 951 in analyzing the duty of confidentiality set forth in Business and Professions Code section 6068, subdivision (e) to determine that the statutory duty of confidentiality applies to information imparted in confidence to an attorney as part of a consultation described by Evidence Code section 951, even if such a consultation occurs *before* the formation of an attorney-client relationship, and *even if* no attorney-client relationship is ultimately created as a result of the consultation.

Nothing has occurred in the interim by way of statute, decisional law, or regulation to persuade us otherwise. Indeed, the California Supreme Court recently stated: “The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result.” (*People ex rel. Dept. of Corporations v. Speedee Oil, Inc.* (1999) 20 Cal.4th 1135, 1147-48 [86 Cal.Rptr.2d 816] [quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, *supra*, 580 F.2d 1311, 1319, fn. omitted].)

Although the phrase “attorney-client privilege” suggests it is applicable only to those individuals who actually retain an attorney, the privilege may apply even when an attorney-client relationship has not been formed. For the purposes of the attorney-client privilege, Evidence Code section 951 defines a “client” to mean: “a person who, directly or through an authorized representative, *consults* a lawyer *for the purpose of* retaining the lawyer or securing legal service or advice from him in his professional capacity . . .” (Emphasis added). Thus, to be a “client” for purposes of the privilege – and, as we discussed in California State Bar Formal Opinion Number 1984-84, the duty of confidentiality – a person need only “consult” with a lawyer with an aim to retain the lawyer or secure legal advice from the lawyer. By its terms, Evidence Code section 951 does not require that the “client” actually retain the lawyer or receive legal advice. Consequently, even if, as we have concluded, Lawyer did not establish, either expressly or impliedly, an attorney-client relationship with any of the individuals who sought him out, we still need to address whether any of those individuals may have become a “client” within the meaning of Evidence Code section 951.

^{3/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{4/} Rule 3-310(E) provides:

“(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.”

Former Rule 4-101 provided:

“A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.”

The critical factor in determining whether a person is a “client” within the meaning of Evidence Code section 951 is the conduct of the attorney. If the attorney’s conduct, in light of the surrounding circumstances, implies a willingness to be consulted, then the speaker may be found to have a reasonable belief that he is consulting the attorney in the attorney’s professional capacity. In *People v. Gionis*, *supra*, 9 Cal.4th 1196, 1211, a criminal defendant claimed his communications with an attorney with whom he had a long standing business relationship were privileged. The defendant had made incriminating statements in those communications and argued that the attorney should not be allowed to testify. Before the defendant had made the statements, however, the attorney had informed the defendant that he would not represent him. The Supreme Court held that the statements were not protected and the attorney could testify about them. The court reasoned that the defendant could not have had a reasonable belief that he was consulting the attorney for advice in his professional capacity after the attorney had manifested his unwillingness to be consulted by expressly refusing to represent him.

As we elaborate in our examples below, taken together with California State Bar Formal Opinion Number 1984-84, *People v. Gionis* suggests that in the non-office settings we consider, an attorney will not owe a duty of confidentiality to the speaker if the attorney: (1) unequivocally explains to the speaker that he cannot or will not represent him, either before the speaker has an opportunity to divulge any information or as soon as reasonably possible after it has become reasonably apparent that the speaker wants to consult with him; and (2) has not, by his prior words or conduct, created a reasonable expectation that he has agreed to a consultation. In the absence of an express refusal by the attorney to represent the individual, however, it is possible for the individual to have a reasonable belief that he or she was consulting the attorney in a professional capacity, even without the attorney’s express agreement. In determining whether a speaker could have such a reasonable belief, other circumstances that should be considered include whether the lawyer has a reasonable opportunity to comprehend that a person is trying to engage in a consultation, whether the lawyer has a reasonable opportunity to interpose a disclaimer before the person begins to speak, or whether the person addressing the lawyer does so in a manner that prevents the lawyer reasonably from interposing any disclaimer or disengaging from the conversation.

In applying these principles to the three situations presented in the facts, it can be seen that variations in those facts could lead to different conclusions.

For example, in Situation 1, if Jones approached Lawyer and blurted out his incriminating statement without giving Lawyer a chance to speak, there would be no basis for finding an apparent willingness of Lawyer to be consulted in his professional capacity.

On the other hand, had Jones, after Lawyer said he was an attorney, manifested a desire to consult privately by speaking in a low voice or drawing Lawyer to an unpopulated corner of the hallway, and Lawyer accompanied Jones without objection, the circumstances could support a finding that Lawyer and Jones impliedly agreed to a consultation. If, instead of merely listening, Lawyer engaged in discussion of Jones’s situation, there would be a strong suggestion that Lawyer was consenting to consult in a professional capacity. (The relative privacy of the setting in which the individual communicates with the attorney is a critical factor which warrants careful examination, as we discuss in some detail in part II.B., below.)

In Situation 2, it appears that Lawyer did not have an opportunity to comprehend that Smith intended to consult with Lawyer and interpose an objection or disclaimer before Smith made any statement. It further appears that Lawyer interposed a disclaimer as soon as reasonably possible given the social setting and the time it would take Lawyer in that setting to comprehend the nature of Smith’s statements. Indeed, the social setting itself weighs against the formation of an attorney-client relationship, by contrast to the more professionally-oriented environment of the courthouse in Situation 1. In these circumstances, Smith could not have had a reasonable belief that Smith was consulting Lawyer in his professional capacity.

On the other hand, if the party’s host had brought Smith to Lawyer and said, “Lawyer specializes in insurance law; he should be able to help you with your problem with that insurance company,” and Lawyer politely listened to Smith’s detailed recitation of the facts underlying his insurance problem before stating he could not help him, Smith could potentially have a reasonable belief that Smith consulted Lawyer in his professional capacity. While the informal social

setting cuts against such a belief, Lawyer's patience in listening to Smith's entire story despite the opportunity to terminate the interaction in a polite manner could lead Smith to believe that Smith was consulting Lawyer in his professional capacity.

Given the familial relationship in Situation 3, Cousin's telephone call to Lawyer at home was not sufficient by itself to enable Lawyer to comprehend that Cousin intended to consult with Lawyer in a professional capacity. Lawyer listened to Cousin's story without interrupting, which could have created a reasonable inference that Lawyer did not object to the consultation. On the other hand, if Cousin spoke quickly without permitting Lawyer to interrupt, Cousin could not assert that Lawyer objectively manifested his consent to a confidential consultation in his professional capacity.

In all three situations, had Lawyer, before any information was disclosed or, at the earliest opportunity afforded by the speaker, demonstrated an unwillingness to be consulted or to act as counsel in the matter, there would have been no reasonable basis for contending that the lawyer was being consulted. (*People v. Gionis, supra*, 9 Cal.4th 1196, 1211.) Absent this critical element of "consultation," the individual would not be considered a "client" within the meaning of Evidence Code section 951.

B. Regardless of whether a person is a "client" within Evidence Code section 951's meaning, neither the attorney-client privilege nor the duty of confidentiality attaches to the communication unless it is confidential.

Even if the surrounding facts and circumstances give the individual a reasonable belief that a lawyer is being consulted in the lawyer's professional capacity, neither the attorney-client privilege nor the duty of confidentiality attaches unless the communication between the individual and the attorney is confidential. Evidence Code section 954 provides that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a *confidential communication* between client and lawyer" (Emphasis added.)

Evidence Code section 952 defines "confidential communication between client and lawyer" as follows:

"As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and *in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation* or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

For the privilege to attach, then, the information the speaker imparts to the lawyer during a consultation must have been transmitted in confidence by means which does not, as far as the speaker is aware, disclose the information to any third parties not present to advance the speaker's interests.

There are a number of circumstance that can affect whether a communication with an attorney is confidential. One of these circumstances is the presence of other individuals who are able to overhear the communication, but are not present to further the speaker's interests. If such a third person is present, there can be no reasonable expectation of privacy. (Cf. *Hoiles v. Superior Court* (1984) 157 Cal.App.3d 1192, 1200 [204 Cal.Rptr. 111] [Attorney-client privilege attached to communications made at meeting with corporate counsel as all persons at meeting, related by blood or marriage, were present to further the interests of the closely-held corporation].)^{5/}

^{5/} Evidence Code section 952 specifies that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer."

A second circumstance that can affect the confidentiality of the communication is the reason why the person speaks to the lawyer. (See *Maier v. Noonan* (1959) 174 Cal.App.2d 260, 266 [344 P.2d 373, 377].) If the communication is intended to obtain legal representation or advice, then the person might be considered to have made a confidential communication to the lawyer. (Evidence Code, §§ 951 and 952.)

A third circumstance affecting the confidentiality of the communication is what actions the attorney took, if any, to communicate to the speaker that the conversation is not appropriate or is not confidential. Because the attorney is dealing in an arena in which he is expert and the speaker might not be, a burden is placed on the lawyer to take what opportunity he has to prevent an expectation of confidentiality when the lawyer does not want to assume that duty. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; Cal. State Bar Formal Opn. No. 1995-141.)

Fourth, confidentiality may also depend on both the degree to which the information communicated by the speaker already is known publicly, and the inherent sensitivity of the information to the speaker. Although the concept of client secrets includes information that might be known to some people, or publicly available, but the repetition of which could be harmful or embarrassing to the client, it nevertheless would be more reasonable for the speaker to expect confidentiality to the extent that the information is truly “secret” in the ordinary sense. (See Cal. State Bar Formal Opn. No. 1993-133. Compare *Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 [2000 WL 1682427, at page 10] [attorney breached duty of confidence owed client by revealing to another client that first client was a convicted felon, where first client had disclosed the fact of his conviction to attorney in confidence, and even though first client’s conviction was matter of public record].)

Applying these principles to the facts presented, variations in those facts could lead to different conclusions:

For example, in Situation 1, if Jones had approached Lawyer and blurted out his statement with others around who could easily overhear him, without making any effort to draw the attorney aside or giving other indications of a need for privacy, and without giving Lawyer a chance to speak, there could not be a reasonable basis to conclude that the communication was confidential.

On the other hand, if Jones asked Lawyer if he were an attorney, Lawyer said yes, and Jones then spoke to Lawyer in a relatively unpopulated area of the hallway, in a low voice and with the Lawyer’s seeming consent, the circumstances are consistent with a confidential communication. The absence of others who were likely to overhear the communication, the modulated tone in which Jones spoke, and the seeming acquiescence of Lawyer, are all consistent with confidentiality.

In the party setting of Situation 2, considerations similar to those in Situation 1 apply. For example, if Smith had taken Lawyer aside to a quiet corner of the room, or had gone with Lawyer into an entirely separate room, then the physical surroundings would have been consistent with a private or confidential communication. However, Smith provided Lawyer with facts that do not seem to be sensitive, much of which already would have been widely known. Consequently, even had Smith spoken in an entirely confidential setting, it appears unlikely that his statements would be found to be part of a confidential communication. If there is no confidential communication, and no actual employment of the attorney, the attorney owes the person who consulted him no duty of confidentiality. (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132].)

Changes in the facts, however, could lead to a different conclusion. Had Smith’s communication included information known only to Smith that suggested how the insurer could successfully defend against Smith’s claim, and if the conversation took place in a confidential setting, the statements could well be found to be part of a confidential communication.

Situation 3 presents the best example of a confidential setting because it occurred over the telephone, out of the hearing of anyone else, and Cousin prefaced his statement by a reference to the kind of legal work Lawyer does. However, although there is a reasonable expectation that no third party would overhear their conversation, the information imparted may not be confidential. For example, if it were already publicly known that Cousin had borrowed and wrecked the car, and Lawyer merely referred Cousin to available counsel, Cousin could not be said to have imparted confidential information. (*In re Marriage of Zimmerman, supra*, 16 Cal.App.4th 556.)

Thus, where an attorney is approached and asked if he or she is an attorney, or where the speaker indicates by his or her actions that he or she wants to speak to the attorney in confidence, for example, by taking the lawyer aside, whispering or similar conduct, the focus then shifts to the attorney to see whether the attorney affirmatively encouraged or permitted the speaker to continue talking. If so, the communication will likely be found confidential.

III. Duties owed to individuals who consult the attorney in confidence

In part II of this opinion, we have discussed how the attorney-client privilege attaches to communications between speaker and the attorney where that speaker has a reasonable expectation that he or she is consulting an attorney in his professional capacity and is imparting information to the attorney in confidence. This privilege attaches even if an attorney-client relationship does not result. In this part, we discuss the duties owed by the attorney where the elements of a confidential communication are established.

Generally, every lawyer has a duty to refuse to disclose, and to prevent another from disclosing, a confidential communication between the attorney and client. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 309 [106 Cal. Rptr.2d 906]; Evid. Code, § 954.) The attorney-client privilege is evidentiary and permits the holder of the privilege to prevent testimony, including testimony by the attorney, as to communications that are subject to the privilege. (Evid. Code, §§ 952-955.)

The attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client. (See Cal. State Bar Formal Opns. No. 1993-133, 1986-87, 1981-58, and 1976-37; Los Angeles County Bar Association Formal Opns. Nos. 456, 436, and 386. See also *In re Jordan* (1972) 7 Cal.3d 930, 940-41 [103 Cal.Rptr. 849].)

In light of the policy goal that underlies both the attorney-client privilege and the attorney's duty of confidentiality – the full disclosure of information by clients to the attorneys who may represent them – we reaffirm our conclusion in California State Bar Formal Opinion Number 1984-84 that, with regard to information imparted in confidence, attorneys can owe the broader duties of confidentiality under Business and Professions Code section 6068, subdivision (e) and rule 3-310(E) to persons who never become their clients. (Cf. *In re Marriage of Zimmerman, supra*, 16 Cal. App. 4th 556, 564 n.2.)^{6/}

As we noted in California State Bar Formal Opn. No. 1984-84, there are significant consequences for the attorney under these circumstances. Not only is the attorney required to treat as privileged all such information communicated to him and resist compelled testimony, but the attorney is also required to treat as secret under Business and Professions Code section 6068, subdivision (e) any confidential information imparted to him in such circumstances. Accordingly, the attorney must also comply with rule 3-310(E), which provides: “[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the

^{6/} We do not address in this opinion the full scope of duties of an attorney under Business and Professions Code section 6068, subdivision (e) to one deemed to be a “client” by virtue of Evidence Code section 951. Suffice it to say that such duties include the obligation to keep confidential information conveyed to the attorney that the client expects will not be disclosed to others nor used against him. However, we decline to opine that other duties, if any, may arise from Business and Professions Code section 6068, subdivision (e) to a person who consults an attorney for the purpose of retaining the attorney or securing legal services or advice, where actual employment or an attorney-client relationship does not result.

employment.”^{7/} For example, if the surrounding circumstances in either Situation 1 or 2 allowed us to conclude that either Jones or Smith had a reasonable belief that Lawyer willingly consulted with them, and they made their communications in confidence, then Lawyer would be precluded from representing Jones’ co-defendant, Doe, and Smith’s insurer, InsuredCo, in the matters at issue.^{8/}

CONCLUSION

The nature and scope of the relationship between a lawyer and a person who seeks advice from the lawyer will depend on the reasonable belief of that person as induced by the representations and conduct of the lawyer. Lawyers should be sensitive to the potential for misunderstandings when approached by members of the public in non-office settings.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities or any member of the State Bar.

^{7/} Whether a lawyer should be disqualified pursuant to rule 3-310(E) is usually determined by reference to the substantial relationship test. (See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1455 [280 Cal.Rptr. 614] [to determine where there is a substantial relationship between two matters, and that there is a likelihood a lawyer acquired confidential information material to the present matter, a court should focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of attorney's involvement with cases].) If there is a substantial relationship, then the lawyer could not accept the subsequent employment because the lawyer’s duty of competence would require its use or disclosure. (*Galbraith v. State Bar* (1933) 218 Cal. 329, 332 [23 P.2d 291].)

^{8/} We do not address the case in which a speaker, in an effort to “poison” a current or potential relationship between a lawyer and a client, communicates with the lawyer, not for the primary purpose of seeking legal advice or representation, but to interfere with his existing or potential client relationship. (See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 [82 Cal.Rptr.2d. 799] [recognizing the possibility that information will be communicated to a lawyer for the purpose of creating conflicts and disqualification].)