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Lawyers in Cyberspace: Legal Malpractice on Computer Bulletin Boards

Brad Hunt†

Never before has it been so easy to communicate with so many people about so many things. What makes it easy is cyberspace:¹ the web of interconnected computers that spans the world. In cyberspace, you can converse with people throughout the world about your topic of choice—from the price of tea in China to the impact of Dennis Rodman on the Chicago Bulls. You simply type messages at your computer that are transmitted through cyberspace to other people at their computers, all around the globe.² Many conversations in cyberspace occur on “bulletin boards”—electronic notice boards devoted to particular topics of discussion, where people can post and read messages about those subjects. Today the thousands of bulletin boards in cyberspace enable people to engage in conversations about an incredible variety of topics.³

In recent years many legal bulletin boards have been created in cyberspace. Legal bulletin boards are forums for the discussion of legal issues.⁴ On many of these bulletin boards, lawyers answer people’s legal questions. Some lawyers do so in the hope of gaining clients, but others do so without financial motive.⁵ By providing information on legal bulletin boards, attorneys perform a helpful and educational service. Nevertheless, this practice has generated some controversy.

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¹ Science fiction author William Gibson coined the term ‘cyberspace’ in his novel *Neuromancer*. William Gibson, *Neuromancer* 51 (Ace, 1984). As described in *Neuromancer*, cyberspace was a consensual hallucination that seemed like physical space but actually was a computer-generated construct in which people could communicate, work, and play. *Neuromancer* was published in 1984; today its fiction is closer to reality than many then thought possible. See Edward A. Cavazos and Gavino Morin, *Cyberspace and the Law: Your Rights and Duties in the Online World* 1-2 (MIT Press, 1994).

² See Cavazos & Morin, *Cyberspace and the Law* at 1-11 (cited in note 1).

³ *Id.* at 3-4, 10.

⁴ See Rosalind Resnick, *A Shingle in Cyberspace*, *Natl L J* 1 (Sept 27, 1993).

⁵ *Id.* See also Daniel B. Kennedy, *PC Practitioners Proliferate*, 79 *ABA J* 36 (June 1993).

Some commentators have pointed out the danger that lawyers answering questions on legal bulletin boards might do so incorrectly.⁶ These commentators have argued that attorneys on legal bulletin boards should be liable for legal malpractice if they provide misleading information and thereby harm a person who relies on the information as legal advice.⁷ No statute or other legal rule directly concerns the issue of legal malpractice on computer bulletin boards, and to date, no court has considered the question.⁸ The law governing this potential problem remains unclear.

This Comment argues that attorneys who answer questions on legal bulletin boards generally should be able to avoid liability for malpractice by employing a disclaimer that states: 1) the information they provide is not authoritative legal advice on which a person should rely, and 2) no attorney-client relationship is formed by virtue of the communications in cyberspace. This "disclaimer rule" would both facilitate the continuation of the beneficial communications that occur on legal bulletin boards and promote the understanding that people should not rely on the information provided in those communications as they would on in-person legal advice.

Part I of this Comment discusses the characteristics of legal bulletin boards. Part II examines the law of legal malpractice. Part III proposes the disclaimer rule, arguing that it would be beneficial as a matter of policy and that it is consistent with principles of malpractice law.

I. LEGAL BULLETIN BOARDS

Legal bulletin boards are notice boards in cyberspace where people discuss legal issues and ask and answer questions about the law.⁹ In recent years, both the number and the popularity of legal bulletin boards have significantly increased. All of the largest commercial online services, including America Online, CompuServe, and Prodigy, provide legal bulletin boards. Legal bulletin boards have proliferated on the Internet,¹⁰ and many oth-

⁶ See Comment, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 *Geo Wash L Rev* 332, 334-35 (1995); Resnick, *Natl L J* at 47 (cited in note 4); Kennedy, 79 *ABA J* at 36 (cited in note 5).

⁷ See Comment, 63 *Geo Wash L Rev* at 355-358 (cited in note 6); Resnick, *Natl L J* at 47 (cited in note 4); Kennedy, 79 *ABA J* at 36 (cited in note 5).

⁸ Comment, 63 *Geo Wash L Rev* at 334 (cited in note 6); Resnick, *Natl L J* at 49 (cited in note 4).

⁹ See note 4 and accompanying text.

¹⁰ The Internet, sometimes called the "network of networks," is the world's largest

ers are provided by smaller, private services.¹¹ As early as 1993, CompuServe's legal bulletin board alone had over 46,000 registered subscribers.¹² Given the current expansion of cyberspace, the use of legal bulletin boards will likely continue to increase.¹³

On many legal bulletin boards lawyers answer people's legal questions. Some attorneys do so through a formal arrangement with the operators of the bulletin board; others do so informally, in the course of using the board as ordinary subscribers. Most lawyers who answer questions on bulletin boards employ disclaimers, or use bulletin boards that employ disclaimers, stating that the information they provide should not be relied on as legal advice.¹⁴ Online attorneys provide a useful service; they convey information that they possess, by virtue of their training and experience, to people who request it. This service is particularly beneficial for several reasons.

First, it is considerably simpler to acquire information from a lawyer in cyberspace than in person. You do not need to look up attorneys in cyberspace; they are always there waiting to talk with you. Cyberspace eliminates the need to make an appointment and set aside half a day's time. Cyberspace makes it possible to converse with a lawyer without leaving your home. Obtaining legal information in cyberspace is as easy as typing a question and waiting for an answer to appear.

Legal information is also considerably less expensive when obtained in cyberspace rather than in person. In cyberspace, information itself generally costs nothing at all; one pays only for the right to spend time online. America Online charges \$9.95 per month for five hours online plus \$3.50 for each additional hour.¹⁵ Most of the other major commercial services, as well as the Internet, are accessible at similar rates.¹⁶ Most smaller bulletin

computer network. It is a decentralized collection of interconnected computer systems located throughout the world. See Edward A. Cavazos and Gavino Morin, *Cyberspace and the Law: Your Rights and Duties in the Online World* 4-5 (MIT Press, 1994) (cited in note 1).

¹¹ For a general discussion of legal bulletin boards, see Rosalind Resnick, *A Shingle in Cyberspace*, Natl L J 1 (Sept 27, 1993) (cited in note 4).

¹² *Id.* at 47.

¹³ See Cavazos & Morin, *Cyberspace and the Law* at 10-11 (cited in note 1).

¹⁴ See Resnick, Natl L J at 49 (cited in note 4). See also David B. Kennedy, *PC Practitioners Proliferate*, 79 ABA J 36 (June 1993) (cited in note 5); Paul Sherman, *Pro Bono on the Information Highway*, 3:6 Nev Lawyer 19 (June 3, 1995).

¹⁵ Price information provided by America Online in January 1996.

¹⁶ Comment, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 Geo Wash L Rev 332, 336 (1995) (cited in note 6) (discussing rates effective in September 1993).

tin boards, moreover, offer their services for free.¹⁷ Consulting an attorney in person, on the other hand, remains prohibitively expensive for many people.¹⁸

An additional advantage of contacting an attorney in cyberspace rather than in person is that in cyberspace one can often do so anonymously. Anonymous communications are common throughout cyberspace, where many people use pseudonyms.¹⁹ Legal bulletin boards are no exception. Some legal bulletin boards are designed so that all the questioner's communications are automatically anonymous.²⁰ Anonymity on legal bulletin boards is likely to encourage people who would be afraid or embarrassed to seek legal advice in person to do so in cyberspace. Because of the sensitive, personal nature of many legal problems, this advantage could be considerable.

Despite these advantages, the practice of lawyers answering questions on legal bulletin boards does pose some risk. Some commentators have pointed out the possibility that online attorneys could provide misleading information on which people might rely.²¹ For several reasons, this risk is arguably greater when lawyers provide information in cyberspace than when they do so in person. First, lawyers answering questions on legal bulletin boards are likely not to research their responses as thoroughly as they would if serving actual clients in the real world. This is due in part to anonymity and in part to the fact that lawyers in cyberspace are not paid. Second, online attorneys are unlikely to be specialists in the particular area of law that any given question concerns. Finally, lawyers in cyberspace will probably receive many questions from people who live in states (or even nations, given the international nature of cyberspace) other than those in which they are licensed to practice law. Lawyers faced with such questions may lack sufficient knowledge of the law in a questioner's jurisdiction to provide fully accurate information. Because of the danger that bulletin board attorneys could answer questions incorrectly, it has been argued that those attorneys should face liability for malpractice if they negligently convey misinformation.²²

¹⁷ Cavazos & Morin, *Cyberspace and the Law* at 3 (cited in note 1).

¹⁸ *Id.* at Preface x.

¹⁹ *Id.* at 14-15.

²⁰ See Sherman, 3:6 *Nev Lawyer* 19 (cited in note 14).

²¹ See note 6 and accompanying text.

²² See Comment, 63 *Geo Wash L Rev* at 336-37 (cited in note 6).

II. THE LAW OF LEGAL MALPRACTICE

Legal malpractice occurs when a practicing attorney fails to use the ordinary skill expected of a lawyer and thereby proximately causes damage to another person.²³ An extensive body of case law governs actions for legal malpractice. None of these cases, however, involve malpractice on a computer bulletin board. Accordingly, the law applicable to such a situation remains unclear.²⁴ This Part will examine the law of legal malpractice in general to lay the groundwork for an argument about how that law ought to be applied to the specific medium of legal bulletin boards.

Legal malpractice is governed by state rather than federal law, so the law varies somewhat from state to state.²⁵ The laws of all the states nevertheless have much in common. Accordingly, this Comment will outline the general principles of malpractice law that are common to all the states, noting variations in the law of particular states where appropriate.

Legal malpractice suits are usually brought as actions in tort.²⁶ The tort theory of malpractice requires a plaintiff to prove: 1) that the attorney had a duty to the plaintiff; 2) that the attorney was negligent; and 3) that the attorney's negligence harmed the plaintiff.²⁷ The Ninth Circuit stated, "[n]egligence is the essence of a malpractice action."²⁸ The standard of care

²³ Black's Law Dictionary 959 (West, 6th ed 1990) (citing *Neel v Magana, Olney, Levy, Cathcart and Gelfand*, 6 Cal 3d 176, 491 P2d 421, 422-23 (1971)) (stating that legal malpractice is the "failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake, and when such failure proximately causes damage it gives rise to an action in tort.").

²⁴ Rosalind Resnick, *A Shingle in Cyberspace*, Natl L J 49 (Sept 27, 1993) (cited in note 4).

²⁵ See *Erie R.R. v Tompkins*, 304 US 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the Law of the State.>").

²⁶ See, for example, *Greycas, Inc. v Proud*, 826 F2d 1560, 1563 (7th Cir 1987); *Peterson v Kennedy*, 771 F2d 1244, 1259 (9th Cir 1985); *Gans v Mundy*, 762 F2d 338, 341 (3d Cir 1985). Some courts allow malpractice actions to proceed under a theory of contract rather than tort. The difference appears to be one of form more than substance. The contract theory requires a plaintiff to prove: 1) that an attorney-client relationship existed; 2) that the attorney breached the contract; and 3) that the breach was the proximate cause of damage to the plaintiff. See *Anoka Orthopaedic Associates, P.A. v Mutschler*, 773 F Supp 158, 166 (D Minn 1991).

²⁷ See *FDIC v Shrader & York*, 991 F2d 216, 221 (5th Cir 1993); *Gans*, 762 F2d at 341.

²⁸ *Peterson*, 771 F2d at 1259.

expected of an attorney is "the skill generally possessed and employed by practitioners of the profession."²⁹

Traditionally, courts have enforced a requirement of strict privity by recognizing that a plaintiff can sue an attorney for malpractice only if he is that attorney's client. This is based on the principle that lawyers owe a duty of professional care only to their own clients.³⁰ Many courts—perhaps a majority—continue to maintain this position today.³¹ Under this approach, the critical question is: was there an attorney-client relationship between the plaintiff and the lawyer accused of malpractice?

An attorney-client relationship is consensual; both the lawyer and the client must agree to the arrangement for the relationship to arise.³² An attorney-client relationship is most clearly present where there is an express contract between the parties. Some courts still require such an express agreement as a basis for a malpractice action today.³³ Nevertheless, in recent years many courts have expanded the class of potential plaintiffs to whom an attorney owes a duty beyond those with whom the attorney has an express contractual attorney-client relationship.³⁴

Courts generally hold that, in the absence of an explicit contract, an attorney-client relationship can be implied by the conduct of the parties.³⁵ An implied attorney-client relationship arises when a person "seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on that advice."³⁶ Several courts have held that an implied attorney-client relationship arises when a lawyer is aware of a person's reliance on him to provide legal services and fails to inform that person that he is not providing such services.³⁷ An attorney-client relationship may be established even if the lawyer is not paid or may fail to arise despite payment.³⁸ Not all of a

²⁹ *Gans*, 762 F2d at 341.

³⁰ See *Savings Bank v Ward*, 100 US 195, 200 (1879); *Bergman v New England Ins. Co.*, 872 F2d 672, 674 (5th Cir 1989).

³¹ See *Bergman*, 872 F2d at 675. See also *David B. Lilly Co. v Fisher*, 800 F Supp 1203, 1209 (D Del 1992).

³² *Bergman*, 872 F2d at 674-5.

³³ See, for example, *Bergman*, 872 F2d at 674.

³⁴ See, for example, *Ikuno v Yip*, 912 F2d 306, 313 (9th Cir 1990); *Greycas*, 826 F2d at 1563.

³⁵ See, for example, *Randolph v Resolution Trust Corp.*, 995 F2d 611, 615 (5th Cir 1993); *Sheinkopf v Stone*, 927 F2d 1259, 1264 (1st Cir 1991); *Anoka*, 773 F Supp at 166 n 11.

³⁶ *Anoka*, 773 F Supp at 166 n 11.

³⁷ See, for example, *Randolph*, 995 F2d at 615; *Sheinkopf*, 927 F2d at 1264.

lawyer's activities give rise to an attorney-client relationship. A lawyer may, for example, answer "a casual, general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising."³⁹ Furthermore, an attorney-client relationship is not formed simply because of a person's subjective belief that the lawyer with whom he is dealing has become his lawyer.⁴⁰ The totality of the circumstances must show that such a belief is objectively reasonable.⁴¹

In recent years, many courts have loosened the requirement of an attorney-client relationship, allowing not only clients but also certain non-clients to bring malpractice actions against lawyers who have caused them harm.⁴² One common way in which courts have done this is by applying third-party-beneficiary theory, which was originally developed as part of contract law.⁴³ Third-party-beneficiary theory maintains that when two parties contract with the intention of benefiting a third party, the third party is entitled to sue for breach of the contract.⁴⁴ In legal malpractice actions, third-party-beneficiary theory is most commonly invoked in order to enable the intended beneficiary of a will to sue the testator's attorney for harming him by negligently preparing the will.⁴⁵

Another approach to malpractice liability is the balancing test, which was developed in California.⁴⁶ Under this approach, a court determines whether an attorney owes a duty to a non-client plaintiff by balancing several factors, including:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame at-

³⁹ Restatement (Third) of the Law Governing Lawyers § 26 comment c (Tentative Draft No 5, 1992).

⁴⁰ *Sheinkopf*, 927 F2d at 1265.

⁴¹ *Id.*

⁴² See note 34 and accompanying text.

⁴³ See Comment, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 Geo Wash L Rev 332, 341-42 (1995) (cited in note 6).

⁴⁴ *Id.*

⁴⁵ See, for example, *Ikuno*, 912 F2d at 313; *Lucas v Hamm*, 56 Cal 2d 583, 364 P2d 685, 688 (1961).

⁴⁶ Comment, 63 Geo Wash L Rev at 342-43 (cited in note 6).

tached to the defendant's conduct, and the policy of preventing future harm.⁴⁷

The purpose of this approach is to extend liability to all cases where, upon consideration of all relevant factors, it seems fair to do so. Several courts have adopted the balancing test.⁴⁸

Some courts have indicated approval for the use of § 552 of the Restatement of Torts as a basis of liability for malpractice.⁴⁹ Section 552 states,

[o]ne who, in the course of his business, profession or employment, . . . 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 care⁵⁰

One recent comment argues for the adoption of § 552 as a basis for liability for legal malpractice on computer bulletin boards.⁵¹

Another possible basis for malpractice liability to non-clients is § 27 of the Restatement of the Law Governing Lawyers, which addresses an attorney's duties to prospective clients. Section 27 provides, "[w]hen a person discusses with a lawyer the possibility of their forming a client-lawyer relationship and even if no such relationship arises, the lawyer must . . . [u]se reasonable care to the extent the lawyer advises or provides other legal services for the person."⁵² The commentary to this section indicates that the imposition of a duty may turn on whether an attorney informs a prospective client of the limitations of his advice. It states that a lawyer has a duty to "caution the prospective client as to the limits of the lawyer's advice," and that "[i]f the lawyer's own opinion is only a tentative or preliminary analysis, the lawyer should so inform the prospective client."⁵³ Section 27 is relevant to malpractice in cyberspace because it involves situations where

⁴⁷ *Biakanja v Irving*, 49 Cal 2d 647, 320 P2d 16, 19 (1958) (en banc).

⁴⁸ *Id.*; *Ikuno*, 912 F2d at 313.

⁴⁹ See *Shatterproof Glass Corp. v James*, 466 SW2d 873, 879 (Tex Civ App 1971); *Greycas*, 826 F2d at 1565; *Brooks v Zebre*, 792 P2d 196, 225 (Wyo 1990) (Urbigkit dissenting).

⁵⁰ Restatement (Second) of Torts § 552(1) (1976).

⁵¹ Comment, 63 Geo Wash L Rev at 355-58 (cited in note 6).

⁵² Restatement (Third) of the Law Governing Lawyers § 27 (Tentative Draft No 5, 1992).

⁵³ *Id.* at comment e.

a lawyer gives legal advice to a person with whom he does not establish a full-fledged attorney-client relationship.

III. THE DISCLAIMER RULE

Attorneys answering questions on legal bulletin boards should generally be able to avoid liability for malpractice by using a disclaimer, or by using a bulletin board that employs a disclaimer, stating that: 1) the information they provide is not authoritative legal advice on which a person should rely, and 2) they are not undertaking to represent any person by responding to that person's questions.

This Comment does not propose that lawyers using disclaimers should be able to avoid liability all the time. Liability is clearly appropriate, for instance, where a plaintiff can prove intentional, rather than merely negligent, misconduct on the part of an attorney.⁵⁴ If a plaintiff can prove that an attorney intentionally induced reliance on detailed, personalized advice, then it would be inappropriate to extend the protection of a disclaimer to that attorney. Hopefully, the use of disclaimers will encourage attorneys to provide general information rather than specific, personalized advice; as advice becomes more personalized, the foreseeability that the recipient might rely on that advice increases.⁵⁵ This caveat notwithstanding, the general rule should be one of protection from liability for attorneys who use appropriate disclaimers.

A. Policy Advantages of the Disclaimer Rule

The advantages of the disclaimer rule stem in large part from the fact that it would promote the continuation of conversations between lawyers and nonlawyers on legal bulletin boards. A rule imposing broad liability for malpractice, on the other hand, would discourage such conversations by deterring lawyers from answering legal questions. Communications between attorneys and nonattorneys in cyberspace are valuable for several reasons.

⁵⁴ In most cases intentional misconduct will not constitute malpractice (which is based on negligence), but rather some other tort, such as fraud. See *Bergman v New England Ins. Co.*, 872 F2d 672, 676 (5th Cir 1989).

⁵⁵ See Rosalind Resnick, *A Shingle in Cyberspace*, Natl L J 6, 49 (Sept 27, 1993) (cited in note 4) ("The more a lawyer attempts to learn about a questioner's case, the more he risks establishing himself as the questioner's attorney and, thereby, exposing himself to malpractice claims and bar grievances.").

First, bulletin board lawyers can provide people with useful information about the law. Even if this information is not a specific, detailed response to a person's particular question (and it is to be hoped that the information will *not* be extremely personalized), it can provide that person with an understanding of the basic issues underlying his problem.⁵⁶ The value of communications on legal bulletin boards is underscored by the widespread and increasing popularity of these bulletin boards, which indicates that the people who use them consider them worthwhile. Although thousands of people use legal bulletin boards every day, not one case has arisen in any court in which an attorney answering questions on a bulletin board has been accused of malpractice.⁵⁷ It has been argued that legal bulletin boards will harm the public's perception of lawyers because lawyers will provide inaccurate information,⁵⁸ but it seems likely that exactly the contrary will be the case. Attorneys who give their time to answer people's questions without expecting payment in return are likely to enhance the public's estimation of lawyers. People seem to appreciate this online service.⁵⁹

Another advantage of the disclaimer rule is that it would decrease the likelihood of reliance on faulty information. The disclaimers inform people that they should not consider information on legal bulletin boards authoritative legal advice. The danger of reliance on erroneous information is further decreased by the fact that online attorneys can encourage the people with whom they communicate to seek the advice of a lawyer outside of cyberspace. As a matter of fact, it appears common for them to do so.⁶⁰ Attorneys on legal bulletin boards may therefore increase the number of people who receive well-researched legal advice.

Other advantages of the disclaimer rule are its simplicity and clarity. It is simple because it requires nothing of attorneys except that they use disclaimers. Most lawyers on legal bulletin boards already employ disclaimers of some sort;⁶¹ accordingly,

⁵⁶ See Daniel B. Kennedy, *PC Practitioners Proliferate*, 79 ABA J 36 (June 1993) (cited in note 5); Paul Sherman, *Pro Bono on the Information Highway*, 3:6 Nev Lawyer 19 (June 3, 1995) (cited in note 14).

⁵⁷ Resnick, Natl L J at 49 (cited in note 4).

⁵⁸ See Comment, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 Geo Wash L Rev 332, 334-35 (1995) (cited in note 6).

⁵⁹ See Sherman, 3:6 Nev Lawyer at 19 (cited in note 14) (discussing one online lawyer who has received positive feedback from the public).

⁶⁰ See *id.*; Kennedy, 79 ABA J at 36 (cited in note 5).

⁶¹ See Resnick, Natl L J at 49 (cited in note 4); Sherman, 3:6 Nev Lawyer 19 (cited in note 14).

the rule would require nothing new. The disclaimer rule would simply facilitate a solution to this problem already in place. The rule is clear because it would inform both lawyers and nonlawyers about the law governing communications on legal bulletin boards. Lawyers would understand the necessity of disclaimers and would know that if they used them they would be protected. Non-lawyers would know that the information received was not legal advice on which they should rely. If the disclaimer rule became established as the law, the rule itself could be incorporated into the disclaimers. A disclaimer could state, for instance, "the information provided on this bulletin board is not intended to be authoritative legal advice on which any person should rely. Courts will not hold an attorney liable for malpractice for negligently providing inaccurate information." This would further promote a clear understanding of the law governing communications between lawyers and nonlawyers in cyberspace.

A rule imposing broad malpractice liability on lawyers who negligently provide information, on the other hand, would be far from clear or simple to enforce. Rather than clearly establishing the rights and duties of communications on legal bulletin boards, such a rule would require that every case of alleged malpractice be subjected to a fact-specific inquiry to determine whether the lawyer was negligent. The disclaimer rule would both eliminate the need to engage in such inquiries and minimize the harm that those inquiries—and malpractice law in general—are intended to prevent: detrimental reliance on negligently provided legal advice.

B. Consistency of the Disclaimer Rule with Malpractice Law

The disclaimer rule is a sensible application of general principles of malpractice law to the medium of cyberspace. In order to bring a malpractice action against an attorney, a plaintiff generally must prove the existence of an attorney-client relationship.⁶² An attorney-client relationship is most clearly present where there is an express contractual agreement between the lawyer and the client.⁶³ Where an attorney uses a disclaimer that expressly repudiates the existence of an attorney-client relationship, no explicit contractual agreement exists.

⁶² See notes 30 and 31 and accompanying text.

⁶³ See note 33 and accompanying text.

In the absence of an express agreement, a plaintiff can prove that an attorney-client relationship was implied by the conduct of the parties.⁶⁴ A plaintiff must show that his reliance on the attorney's advice was reasonably foreseeable under the circumstances.⁶⁵ 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. Furthermore, some courts have held that an implied attorney-client relationship arises only where a lawyer is aware of a person's reliance on him to provide representation and fails to take action to negate that reliance.⁶⁶ 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. Section 27 of the Restatement of the Law Governing Lawyers, which deals with an attorney's duties to prospective clients, lends further support to the application of the disclaimer rule to legal malpractice in cyberspace. Section 27 states that a lawyer has a duty to caution prospective clients as to the limits of his advice and to inform them if that advice is only a tentative or preliminary analysis.⁶⁷ By using an appropriate disclaimer, an online attorney would be doing exactly that.⁶⁸

CONCLUSION

By answering questions on legal bulletin boards, attorneys provide a valuable service. The disclaimer rule would enable the benefits of that service to continue while simultaneously guarding against its primary danger—the risk of reliance on incorrect advice. It is a clear rule that would be simple to enforce, and it is a logical extension of principles of malpractice law to the new medium of cyberspace.

⁶⁴ See note 35 and accompanying text.

⁶⁵ See note 36 and accompanying text.

⁶⁶ See note 37 and accompanying text.

⁶⁷ See notes 52 and 53 and accompanying text.

⁶⁸ The recently developed theories under which nonclients can sue attorneys for malpractice should not be applied to legal bulletin boards either. Third-party-beneficiary theory is not applicable to the problem discussed by this Comment—harm to the direct recipients of misleading advice. The balancing approach and section 552 of the Restatement of Torts are based on policy concerns and should be rejected for the policy reasons discussed in Part III.A of this Comment.