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University of Texas Law CLE Virtual Studio Webcast
First Friday Ethics

February 3, 2023 - REPLAY

A Legal Ethics Wish List

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I. Introduction.

These written materials accompany the above-titled legal ethics CLE presentation addressing issues related to a working understanding of the conflicts of interest rules, tools to help navigate those rules (like engagement letters and "I'm Not Your Lawyer" letters), the difference between the attorney-client privilege and the lawyer's ethical duty of confidentiality, and a proper appreciation of the application of the "No Contact" Rule. The presentation is based largely on the Texas Disciplinary Rules of Professional Conduct ("Texas Rules") and Comments thereto, Texas state and federal case law, and the American Bar Association's ("ABA") Model Rules of Professional Conduct, Comments thereto, and ABA Formal Ethics Opinions.

The materials (and the underlying presentation) are not intended to be, and do not constitute, personal legal advice. At the same time, these written materials are designed to be a resource for attendees.

II. Who is the Client?

One of the most fundamental aspects of understanding ethical obligations of loyalty and confidentiality is first appreciating the identity of the attorney's client. If one does not know the identity of the client, one cannot apply the Rules of Professional Conduct dealing with conflicts of interest, nor can one appreciate whose information one is ethically obligated to keep confidential. It is particularly important for attorneys to be thoughtful and intentional in identifying who is – and who is not – the attorney's client.

Though an engagement letter is certainly a valuable tool that an attorney can and should use to help identify who is – and who is not – a client for a particular representation, the execution of an engagement letter by a client is a not a *requirement* in most cases, and the lack of an engagement letter does not necessarily mean that there is not a client-lawyer relationship. Furthermore, the fact that someone pays for a representation does not – by that fact alone – mean that the attorney has a client-lawyer relationship with that person, especially when one considers that there is a specific Texas Disciplinary Rule – Texas Rule 1.08(e) – that expressly provides for someone other than the client paying the attorney's fees.

The client-lawyer relationship is one of principal and agent and it need not be expressly established in writing. Texas courts have recognized the objective standard to be applied when determining the existence of a client-lawyer relationship:

> An attorney-client relationship is a contractual relationship in which an attorney agrees to render professional services for a client; the relationship may be established expressly or be implied from the conduct of the parties. … In determining whether an attorney-client relationship can be implied, we examine the conduct of the parties using an objective standard, determining whether the parties' communications or actions manifest that both parties intended to create an attorney-client relationship; we do not consider the parties' unstated, subjective beliefs. A law firm does not have an attorney-client relationship if the purported client neither sought nor obtained legal services from the law firm.

DeYoung v. Beirne, Maynard & Parsons, L.L.P., 2014 Tex. App. LEXIS 2965, at *7-8 (Tex. App. Mar. 18, 2014) (internal citations omitted); *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 365 (5th Cir. 1999) ("An attorney-client relationship arises when an attorney agrees to render professional services for a client. Once the parties enter into an attorney-client relationship, the attorney owes fiduciary duties to his client. … Generally, in the absence of evidence that the attorney knew a party had assumed he or she was representing it in a matter, the attorney has no affirmative duty to inform the party that he is not its attorney. An attorney can, however, be held negligent where he fails to advise a party that he is not representing it on a case where the circumstances led the party to believe that the attorney was providing representation.") (internal citations omitted).

The prudent attorney will be intentional and clear as to who he or she represents and does not represent. Preferably, that identifying is made at the outset of the representation in an engagement letter. (In situations where there may also be non-clients who the attorney (or a reasonable person) may fear would be confused about the identity of the client, the attorney can send an "I'm not your lawyer" letter to the non-client to eliminate any possible confusion.

Some courts have also suggested that attorneys representing some but not all parties in business formation representations can set forth conspicuous disclaimers of representation in the organizing documents themselves. *See*, *e.g.*, *Hacker v. Holland*, 570 N.E.2d 951, 956, n. 6 ("We note, as did the *Fox* court, that 'a simple clause in the agreement stating that it was prepared by the attorney for the opposite party acting solely on behalf of that party's interest, and advising the other parties to seek independent legal counsel to protect their own interests,' could prevent actions such as this. *Fox*, 181 Cal. App. 3d at 958, n. 2, 226 Cal. Rptr. at 534, n. 2.").

With respect to representing entities, the general rule is that the attorney's client is the entity itself and not the individual directors, officers, or employees. *See* Texas Rule 1.12(a) ("A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall

Title search: A Legal Ethics Wish List (REPLAY)

First appeared as part of the conference materials for the
2023 First Friday Ethics (February 2023) session
"A Legal Ethics Wish List (REPLAY)"