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Deadly Sins of Attorney Fee Agreements

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I. INTRODUCTION

Many papers have been written about attorney engagement letters. The Texas Bar CLE online library contains a wealth of information about how to describe the relationship with the client such that the scope of the engagement and the client's responsibility for expenses and fees is not likely to be misunderstood.

The purpose of this paper is to remind lawyers which disciplinary rules are directly applicable to fee agreements. The paper also contains suggestions for compliance.

II. THE VARIOUS ROLES OF A LAWYER

When you are forming a relationship with a client, or working on a matter for a client that has been assigned to you by a partner in your law firm, it is helpful to recognize at the outset what function you are performing. There are five distinct functions or roles of the lawyer. You may be called upon to act in one or several of these functions. They are:

- Advisor – providing a client with an informed understanding of the client's legal rights and obligations and explaining their practical implications.
- Advocate – zealously asserting the client's position under the rules of the adversary system.
- Negotiator – seeking a result advantageous to the client but consistent with requirements of honest dealing with others.
- Intermediary – reconciling, between clients, their divergent interests as an advisor and, to a limited extent, acting as a spokesperson for each client.
- Evaluator – examining a client's affairs and reporting about them to the client or to others.

Tex. Disciplinary Rules Prof'l Conduct Preamble, ¶2.

III. THE ATTORNEY-CLIENT RELATIONSHIP

A. Beginning the relationship

It is important to note the relationship can begin without an official fee agreement between the attorney and client. Rather, because the attorney-client relationship is contractual in nature, it begins when an attorney agrees to render professional services for a client. This agreement may be express or implied from the conduct of the parties. See *Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 633–34 (Tex. App.—Houston 2010, no pet.) (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied)). In fact, the relationship can be formed even when there is no agreement for payment of a fee or no payment of a fee at all. The relationship may simply exist as a result of rendering services gratuitously. *Id.*

B. Whether an agreement was reached with the client

Because it is a creature of contract, the determination of whether an agreement has been reached is made by using objective standards of what the lawyer and possible client said and did, instead of looking at their subjective states of mind. *Terrell v. State*, 891 S.W.2d 307 (Tex. App.—El Paso 1994, pet. ref'd). It is not enough that either the lawyer, or the client, alone, thinks he has made a contract. It is not enough that the client just "thinks" that you represent him. There must be objective indications. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

C. Consulting with "prospective clients"

Many times a lawyer will consult with a prospective client to determine whether or not he wants to undertake the representation. Be careful here. There are cases that broadly provide that the attorney's fiduciary obligations arise even during those preliminary consultations if the attorney discusses with the potential client his legal problems with a view toward undertaking representation. *See Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982). However, because the attorney-client relationship is a creature of contract, it is the clear and express agreement of the parties that defines the duties of each. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).

The cases that talk about an attorney's duties toward someone with whom he consults about the possibility of representing him are generally focused on the professional obligations of the lawyer as he performs incidental services necessary to making a decision about taking the case. For instance, the confidentiality rules of 1.05 apply. To the extent that incidental legal services are performed (such as in accumulating medical records for review, or advising of the statute of limitations), the lawyer should use reasonable care.

There is very little case law available concerning duties toward a prospective client. Most of the law concerning these duties has to do with the use of confidential information obtained when interviewing a prospective client. But the Restatement of the Law Governing Lawyers (Third) is helpful. The Restatement contemplates that when a person discusses with a lawyer the possibility of their forming a relationship, it is for a "matter." This is important because most preliminary consultations result in an agreement to perform only some incidental legal services in connection with the continued investigation of the matter, until such time

that the lawyer determines whether or not to take the matter. Here is how the Restatement handles it in Section 15, Lawyers Duties to a Prospective Client:

> § 15. A Lawyer's Duties to a Prospective Client
>
> 1. When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:
>
> (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;
>
> (b) protect the person's property in the lawyer's custody as stated in §§ 44-46; and
>
> (c) use reasonable care to the extent the lawyer provides the person legal services.

So there is a definite distinction between the incidental legal services to be performed in the investigative stage and the ultimate "matter," which may or may not become the subject of the agreement.

D. Duties beyond the agreement

Generally, the lawyer has no duty to the client beyond those described in the agreement. Of course the lawyer must always abide by the Texas Disciplinary Rules of Professional Conduct, but because it is based on contract, the legal relationship is defined by the "clear and express agreement of the parties as to the nature of the work to be undertaken." Annot., 45 ALR 3d. 1181 (1972).

However, there may be a duty to inform someone that you do not represent them. The duty to so advise would arise if it can be determined that the attorney is aware or should be aware that his conduct would lead a reasonable person to believe that he was being represented by the attorney. *Parker*, 772 S.W.2d 151.

IV. FEE ARRANGEMENTS

A. Documenting the attorney-client relationship or agreement

It is best to document the attorney-client relationship in writing. A written document is not explicitly required except for contingent fee cases, Tex Disciplinary Rules Prof'l Conduct R. 1.04(D), and in cases involving association with or referral to a different law firm or lawyer. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(F). However, documenting all attorney-client relationships in writing is obviously preferable.

B. Establishing the fee agreement at the outset

In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006). One of the most important and overlooked parts of an attorney conducting himself or herself in an ethical manner with clients—and in avoiding disputes and malpractice claims—is clearly establishing the fee agreement from the beginning of the attorney-client relationship.

C. Unreasonable fee vs. unconscionable fee

An important thing to note about Rule 1.04 is that it does not prohibit an "unreasonable" fee, it only prohibits an "unconscionable" fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04. Does this make sense? Yes. Remember, the disciplinary rules are written for the purpose of lawyer discipline. As bankruptcy courts, other judges or juries regularly reduce the amount of attorneys fees that have been sought at trial, the effect is that the factfinder regards some of the fees sought as unreasonable. If Texas Disciplinary Rules of Professional Conduct Rule 1.04 was cast in terms of unreasonableness, a client would be entitled to file a grievance against the lawyer in every instance where a factfinder reduced the fees that were sought. It is for this reason that 1.04(a) contains the second sentence which defines "unconscionable."

D. Fee contract vs. fee shifting

Remember that the attorney-client relationship is contractual in nature, and begins when an attorney agrees to render professional services for a client. The concept of the contract is important in the fee context because the fees charged to the client (authorized by contract) may not necessarily be the same as the fees recoverable from the adverse party under any of the causes of action described above. For example, a client agrees to pay a paralegal for all of his/her work, but only substantive legal work is allowed as a basis for recovery from the other party. Another example is that a client may make requests of the attorney to perform certain activities (which are to be paid for as authorized by the contract), but these activities may not necessarily be necessary to the prosecution of the case, such that they may not be recoverable from the adverse party. What does all of this mean? It means that you should tell your client up front that just because his cause of action against the adverse party may authorize the recovery of attorney's fees, he will not necessarily recover one hundred percent of his fees. This is a frequent problem

Title search: Deadly Sins of Attorney Fee Agreements

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15th Annual Estate Planning, Guardianship and Elder Law Conference session
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