

ENGAGEMENT AGREEMENTS:

**The Top 20 Country Countdown with
Tips for Ethical Compliance**

D. DIANE DILLARD

Brownsville, Texas

956-346-3001

diane-dillard@att.net

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D. Diane Dillard

Attorney at Law

5460 Paredes Line, Suite 206

Brownsville, Texas 78526

956-346-3001

diane-dillard@att.net

Profile

Diane Dillard is a Board Certified Commercial Real Estate Attorney who practiced law in Houston, Texas for 23 years prior to moving to Brownsville, Texas when her husband, Andrew Hanen, was appointed as a Federal District Judge for the Southern District of Texas, Brownsville Division. Ms. Dillard has been an Adjunct Professor at South Texas College of Law (Real Estate Development and Texas Land Titles) and an Adjunct Professor at the University of Texas at Brownsville (Business Law). She frequently speaks and writes on real estate law topics for the State Bar of Texas, various Texas law schools, the American Bar Association, and the American College of Real Estate Attorneys.

Experience

The Dillard Law Firm — 1998 - Present

Ms. Dillard practiced as a solo practitioner in Houston, and later in Brownsville. She has continued to represent clients on commercial real estate matters.

Dillard & Ray, Houston, Texas — 1987 - 1998

Founded law firm catering to clients in the real estate industry. Ms. Dillard's clients included national, regional and local developers who followed her to the new firm. She was involved with the purchase, leasing, and sale of real property from raw land to high-rise office buildings. She also represented new clients, including developers of condominium high rises, regional malls, apartment complexes, office buildings, apartment buildings, and retail centers. (The law firm name changed over the years to include additional new partners, with its last variation being Dillard, LeBarron & Brasier.)

Vinson & Elkins, Houston, Texas — 1979 -1987

As an Associate in the Real Estate Section of Vinson & Elkins, Ms. Dillard was trained by well-recognized real estate attorneys on a variety of significant transactions. She became the lead lawyer for numerous clients and directed younger associates in connection with both projects and transactions.

Education

Baylor University School of Law - JD, Cum Laude - 1979

Baylor University - BA, Magnum Cum Laude - 1976

Memberships

American College of Real Estate Attorneys (Elected 1993)

State Bar of Texas and The Real Estate Probate Trust Law Section (Chair of this 5,000 member section in 2000 - 2001)

Baylor University Alumni Association (President 1998-1999)

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ENGAGEMENT AGREEMENTS: The Top 20 Country Countdown with Tips for Ethical Compliance

It is easy to postpone your own legal needs when demanding clients (and hopefully paying clients) are fighting for your attention. Procrastination, I believe, is the main reason lawyers sometimes fail to use their skills to draft an effective Engagement Agreement for their own use. For the next few minutes, I am asking that you focus your attention on your own legal needs.

So, what does an Engagement Agreement need to be effective? Obviously, the agreement must be tailor-made for the circumstances. However, it is extremely helpful to have a basic form agreement that:

- Clearly explains the terms and conditions of your relationship with your client;
- Complies with the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”);
- Increases the likelihood that you will be paid for your legal services; and
- Protects you from lawsuits to the extent that it is legal, ethical and appropriate.

There are several resources that will help you in this task.

First, I highly recommend the Texas Real Estate Forms Manual (“Forms Manual”) that is written and updated by the Texas Real Estate Forms Committee (“Committee”). Chapter 1 of the Forms Manual is dedicated to practical ethics and contains well thought out forms that are the product of some amazing brainpower. With the gracious permission of Texas State Bar Books and the Committee, I have included many of these forms as exhibits to this paper for your use.

Second, the Real Estate Probate and Trust Law Section of the Texas State Bar (“REPTL”) provides to its members a free on-line CLE Library that can be searched by topic, course or author. The REPTL website address is www.reptl.org.

Third, the Texas Center for Legal Ethics (“Center”) provides on its website the text of all opinions of the Supreme Court Professionalism Committee. These Texas Ethics Opinions may be searched by opinion number or by keywords. The website address for the Center is www.legalethictexas.com. Licensed attorneys may also call the Center at 877-953-5535 for access to opinions.

The advice and forms¹ contained in this article are arranged chronologically from the initial potential client interview to the termination of the attorney client –relationship. Although chronological, I have used a 20 numbered countdown similar to the familiar countdown used to present the top 20 most popular songs of the week. Why fuse practical legal ethics with Country Music? This speech is scheduled at 3:00 pm on Friday, as the last speech of the last day of the 2013 Real Estate Drafting Course. Need I say more?

20. *Should Have Said No* Taylor Swift²

Screen and evaluate all potential clients. Before you even consider an engagement agreement, determine if you will represent the client in the proposed matter. A lawyer is not required to represent everyone who seeks his advice. In addition, a lawyer should not accept representation in a matter unless he/she can perform competently,

¹ In the spirit in which this paper is presented, the author disclaims everything in it. No warranties express or implied are made. I do not purport to give legal advice nor am I attempting an in-depth discussion of all the precautions an attorney should consider. None of the attached forms and sample letters will completely exonerate the attorney using them in any given situation. Nevertheless one can hope that thoughtful use of the information presented here will memorialize the attorney’s good faith attempt to comply with all applicable rules of professional conduct.

² *Should Have Said No* was written and performed by Taylor Swift.

promptly and without a conflict of interest. See generally Texas Disciplinary Rules of Professional Conduct (“Texas Rules”) 1.01, 1.06, 1.07, 1.08, 1.09, and 1.15.

If your instincts tell you a prospective client or prospective business may cause you trouble, follow your instincts. What characteristics of a potential client or potential business may cause a red flag?

- The client who is always in a hurry.
- The client who makes unreasonable demands.
- The client who does not have the financial ability to pay you.
- The client who is not willing to pay you without a battle.
- The client who dislikes lawyers.
- The client who has been unsatisfied with several attorneys.
- The client with a matter outside your expertise.
- The client with a matter that is too big or too small.
- The client who is so unsophisticated that he may have trouble understanding the transaction, his options and the ramifications of his decisions.
- The client who suffers from mental deficiencies to the degree that he cannot make informed decisions or remember decisions he has made.
- The client you don’t like.

Obviously, you cannot turn down all prospective clients, but being choosy is important. Properly screening and evaluating potential business and clients may be the single most important task of a lawyer seeking to minimize malpractice exposure.

19. *Here’s a Quarter (Call Someone Who Cares)* Travis Tritt³

Make it clear that you are not their attorney. When discussing the possibility of representing a potential client, you should clearly tell them that you are not their attorney unless and until you both sign an engagement agreement and the potential client pays the requested deposit (if applicable). In some instances, you may want to put this in writing. In addition if you decide to turn down the business, you should clearly communicate this to the potential client and consider sending a letter that specifically states that you have not agreed to represent the potential client. Why is this advisable?

The attorney-client relationship is one of agent and principal. Fiduciary obligations and responsibilities are imposed on the attorney. *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W. 2nd 627, 633 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.). It is a contractual relationship whereby an attorney agrees to render professional services for a client. *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3rd 432, 437 (Tex.App. -Houston [1st Dist.] 2000, no pet.). The relationship may be expressly created by contract, or it may be implied from the actions of the parties. *Sutton v. Estate of McCormick*, 47 S.W.3rd 179, 182 (Tex. App.-Corpus Christi 2001, no pet.); *Vinson & Elkins v. Moran*, 946 S.W.2nd 381, 405 (Tex. App.-Houston [14th Dist.] 1997, writ diss’d by agr.). For example, an attorney-client relationship can be implied from the party’s conduct and from the attorney’s gratuitous legal services. *Sotelo v. Stewart*, 281 S.W. 3rd 76 (Tex. App.—El Paso 2008, pet. den.).

A question of fact exists when the evidence does not conclusively establish the existence of an attorney-client relationship. *Sutton v. Estate of McCormick*, 47 S.W.3rd 179, 182; *Kanow v. Brownshadel*, 691 S.W.2nd 804, 805-06 (Tex. App.-Houston [1st Dist.] 1985, no writ). In *Nolan v. Foreman*, 665 F.2nd 738, 739 n.3 (5th Cir.1982), Percy Foreman argued that there was no attorney-client relationship prior to reaching a fee agreement. The Court, however, held that the attorney’s fiduciary duties attached when Foreman entered into discussion of the client’s legal problems with a view toward undertaking representation. In *Tanox v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*,

³ *Here’s a Quarter (Call Someone Who Cares)* was written and performed by Travis Tritt.

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