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The Anatomy of an Attorney's Engagement Letter

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The Anatomy of an Attorney's Engagement Letter

by

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I. Introduction.

These written materials accompany the ethics CLE presentation by George Coleman and A.J. Singleton entitled "The Anatomy of an Attorney's Engagement Letter." The written materials are meant to be a resource for the practicing attorney who might find him/herself having to determine the best way to document the formation of an attorney-client relationship. Along the way, the presentation and these materials will identify relevant Texas Disciplinary Rules (or ABA Model Rules of Professional Conduct). At the same time, while some parts of the sample "Engagement Letters" are not necessarily required by the applicable rules of professional conduct, the prudent practicing attorney may nonetheless want to consider incorporating such additional terms into his/her "engagement letters," if only to effectively communicate with the client about who is (or who is not) a client, the scope of the work to be undertaken by the attorney for the client, and the method by which that attorney will be compensated by the client. By establishing these and other basic points, the attorney not only controls the client's reasonable expectations, but possibly also mitigates the risk of a future malpractice action.

II. Who is the Client?

One of the most fundamental questions of legal ethics and attorney risk management is this: "who is the client?" The answer to this question is critically important, in large part, because an attorney's duties of loyalty and confidentiality typically flow only to the "client" and not to third parties to whom or which the attorney has no attorney-client relationship.

At the same time, the answer to the question is not always an easy one. Under Texas case law, the formation of an attorney-client relationship is a question of contract formation. *Kiger v. Balestri*, 376 S.W.3d 287 (Tex. App. Dallas 2012) (the attorney-client relationship results exclusively from contract); *Kennedy v. Gulf Coast Cancer & Diagnostic Center at Southeast, Inc.*, 326 S.W.3d 352 (Tex. App. Houston 1st Dist. 2010). That being said, the relationship may be created either expressly or by implication based on the actions of the parties. Although some commentators worry that an attorney-client relationship may exist merely because one party subjectively believed that the lawyer had agreed to provide legal services, that is not ordinarily the result.[1]

For an in-depth discussion of formation of attorney-client relationships, *see generally* 7 Tex. Jur. 3d. 644 (Attorneys at Law Sec. 240). Whether the attorney-client relationship is created by the expressed actions of the parties or implied from the actions of the parties, at least two persons who have the capacity to contract are essential to the formation of a contract. *See Spradley v. Whitehall*, 314 S.W.2d 615 (Tex. Civ. App Fort Worth 1958).

Texas' "test" for the formation of an attorney-client relations appears consistent with the "test" set forth in the *Restatement of the Law Governing Lawyers*, § 14, regarding "Formation of

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[1] Section 120 of 7 Tex. Jur. 3d Attorneys at Law states the proposition as follow:

> "Although the attorney-client contractual relationship exists if the attorney agrees to render professional services, the existence of that relationship is to be determined by the express or implied conduct of both parties; the attorney-client relationship is to be determined by the express or implied conduct of both parties; the attorney-client relationship does not merely exist merely because one party subjectively believes the other as agreed to render legal services." Citing *LeBlanc v. Lange*, 365 S.W.3d 70 (Tex Civ. App. Houston 1st Dist. 2011); *In re Baytown Nissan Inc*., 451 SW 3d 140 (Tex. Civ. App. Houston 1st Dist. 2014).

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