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Your Lawyer, Am I?

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YOUR LAWYER, AM I?

I. INTRODUCTION

A. A Very Important Question

The attorney-client relationship is one of the most recognized, protected, and significant legal relationships in existence. If I am your attorney, I owe you a duty of competence (Rule 1.01), a duty to dissuade you from future wrongs (Rule 1.02), a duty to encourage you to right past wrongs (Rule 1.02), a duty to keep you informed (Rule 1.03), a duty not to charge an unconscionable or unexplained fee (Rule 1.04), a duty to maintain your confidences (Rule 1.05), a duty of loyalty (Rule 1.06), a duty to be honorable in my business transactions with you (Rule 1.08), a duty to escalate my concerns to your higher-level representatives when representing an entity (Rule 1.12), a duty to safeguard funds and property entrusted to me (Rule 1.14), a duty to give you advice you may not want to hear (Rule 2.01), and a duty to maintain professional independence in pursuing your interests (Rule 5.04). TEX. DISCIPLINARY RULES OF PROF'L CONDUCT (2019). Put simply, if I am your lawyer, I owe you a fiduciary duty and can be held accountable through, among other things, malpractice and breach of fiduciary duty claims, to which my good faith attempts at competence are no defense. *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989) ("There is no subjective good faith excuse for attorney negligence.") Indeed, I may be liable for fee forfeiture, even if you have no actual damages. *Burrow v. Acre*, 997 S.W.2d 229, 240 (Tex. 1999) ("We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.").

Moreover, if I am your lawyer, our confidential communications made to facilitate the rendition of my professional services enjoy a near-impenetrable privilege from discovery by anyone else ever. TEX. R. EVID. 503.

You might think that if I am not your lawyer, I owe you none of these things and our conversations are just talk. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT (2019), Preamble, Cmt. 12 ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.") And yet it is not quite that clear. *Id*. ("But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established."). At least under the Texas Rules of Disciplinary Procedure. *Id*. at Cmt. 15 ("These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.") and n. 16 ("Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege.")

Put simply, whether I am your lawyer is an extraordinarily important question, yet many attorneys practice a career's worth of law without examining when someone goes from acquaintance to client.

B. CLE In Action

Like all good CLE writers, I say this at the end of the paper, but given the topic it seems appropriate to touch on it up front: this paper is not legal advice and does not make me your lawyer.

II. DISCUSSION

A. The Texas Disciplinary Rules of Professional Conduct

1. Not A Civil Standard

Before turning to case law, it is worth discussing the view of the Texas Disciplinary Rules of Professional Conduct (the "Texas Rules") with respect to the point at which an attorney-client relationship is formed. As noted in the Introduction above, however, it is important to remember that the Texas Rules do not establish any standard of civil liability, give rise to any private right of action, or augment any legal duty lawyers owe clients:

> 15. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Likewise, these rules are not designed to be standards for procedural decisions. Furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT (2019), Preamble, Cmt. 15; *see also id*. at Cmt. 16 ("Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege.").

2. Clients and Prospective Clients

As you might expect, the Texas Rules explain that whether an attorney-client relationship exists will depend on the facts of the case and the applicable law. Give the paper discusses the applicable law separately below, I would like to highlight a curious statement the Texas Rules make regarding an attorney's obligations to a *prospective* client:

> 12. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. *But there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established.*

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