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Ethics Checklist for Transactional Representation of Group Clients in the Music Business

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By Chris Castle[1]

This checklist and backgrounder covers some common ethics topics that may get overlooked in the deluge of a busy law practice. Non-engagement letters and disengagement letters can fall into the "what everyone thinks you already know" category often are unspotted issues. It is also helpful to have forms or at least checklists for these events readily available to increase the level of compliance. Your insurance carrier will thank you.

1. The Unintended Client:

We all receive calls or emails from inquiring persons regarding potential representation. Very often, these inquiries come from nonclients who do not read or ignore our website materials describing areas of law we *do not* practice. These inquiries may be referrals or unsolicited calls or may come in the form of an email that on its face suggests the inquiring person may have already blown a deadline or ignored a cease and desist letter.

Unsolicited mail, email (including webform email hosted on your website) or calls may take extra time to review for a variety of reasons. Assistants may not pass messages on quickly enough, the potential client may not express themselves clearly, or other reasons. This can be true even of potential clients seeking representation in areas of law that you *do* practice.

If you determine that you are not able to undertake representation after researching conflicts and other issues, it is important to decline the potential representation in a timely manner, if not on the initial inquiry call or in reply to the inquiry email. It is also well to confirm that you are declining representation in writing, particularly when any deadline is involved in the potential client's communication. In fact, it is a good idea to tell the inquiring person on a phone call that you will be sending them a letter confirming that you are not undertaking the representation as a matter of formality and asking for an email or physical address to use for that letter.

An effective non-representation letter should document the date and time of the call or written communication, the general subject matter concerned, a statement that you have not evaluated the merits of their situation (and so have not given legal advice), and that you informed the inquiring party that you were not undertaking the representation. You may want to discuss with your insurance carrier whether they have any particular requirements.

If a discussion of deadlines or statutes of limitations were disclosed by the inquiring person, you should confirm that you informed the inquiring person of the importance of engaging counsel to advise them in time to satisfy any deadlines. It is not incumbent upon you to recommend other counsel to the inquiring party, but you can suggest they contact the State Bar lawyer referral service.

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A special case is the inquiring party who you may be able to represent and who asks for your rates but who then disappears. It is also well to close off that situation with a nonrepresentation letter.

Of course, the information given by the inquiring party should be treated as confidential and potentially privileged. Comment 1 to Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct states "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed ***or sought to employ*** the lawyer." Further, courts will likely recognize an attorney-client relationship when the attorney's conduct would lead a reasonable person to believe that she was being represented by the attorney based on the conduct and communications of the attorney and putative client. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex.App. 1989) (reversed and remanded "…for a trial on the issues of whether the attorneys were negligent in failing to advise [Plaintiff] that they were not representing her interests….")

Texas Ethics Opinion 691 is informative on the more nuanced issues relating to potential clients. (Tex. Comm. On Professional Ethics, Op. 691 (2021) available at https://www.legalethicstexas.com/resources/opinions/opinion-691/). At issue in the case is whether there is a former client conflict when a prospective client attempts to disqualify another lawyer in the firm (or the firm itself) who subsequently represents a different client in a matter adverse to the subject matter of the prospective client's original inquiry—when the prospective client did *not* engage the firm.

Opinion 691 concludes:

> A lawyer's consultation with a prospective client may result in a disqualifying adverse limitation under Rule 1.06(b)(2). Whether a lawyer's representation of a client reasonably appears to be adversely limited by the lawyer's duty of confidentiality to a former prospective client is ordinarily a factual inquiry. As a general rule, a lawyer should not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

The ABA Model Rule 1.18 "Duties to Prospective Clients" is directly on point and should be kept front of mind, especially 1.18(b): "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."

Finally, if you have been sent any unsolicited documents to "review" by an inquiring person, you may wish to return those documents if you decide not to go forward. You can then include in your nonengagement letter language such as:

Title search: Ethics Issues for Transactional Practice

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