Engagement Letters: Beginning a Beautiful Relationship

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About the Author

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THE ABA STANDING COMMITTEE on Lawyers' Professional Liability recently released data on a cross-section of legal malpractice claims from 2008 to 2011, reporting that nearly 16 percent of all claims had been caused by poor client communications. To avoid such an outcome, lawyers should start their relationship with a client by having a full and frank discussion about the goals and terms of the engagement and the responsibilities of both the attorney and the client. Shortly after, the oral agreement needs to be accurately committed to paper.

Many jurisdictions mandate the content of written engagement letters in certain situations, and lawyers must consult the local rules before settling on the form of engagement letter to use as a guide. The ABA Model Rules of Professional Conduct "prefer" written engagement letters and require written agreements only where a contingency fee is permitted (Rule 1.5(c)) or where the fee charged may be considered entering into a business transaction with a client (Rule 1.8(a)). The Comments accompanying Rule 1.5 state that in order to avoid possible misunderstandings, it is "desirable" for an attorney to provide the client with a memorandum or statement containing "the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation."

Even where a jurisdiction does not mandate the use of a written engagement letter, however, maintenance of office procedures requiring that all engagements be reduced to writing is a sound risk management policy and promotes compliance with the Model Rules. Think of the engagement letter as a road map to the representation you and the client are considering. The structure of the engagement letter should include what the attorney needs to know to effectively represent the client and to get paid for the services rendered.

IDENTIFY THE CLIENT

As an initial matter, the engagement letter should identify the client whose interests are being represented. Equally as important is a definition of those whose interests are not being represented by the attorney. In representing a business organization, particular care should be taken to explain to the constituents of the organization that the organization is the attorney's client where the interests of the organization may not be aligned with those of the constituents, as noted in Model Rule 1.13(f). Engagement letters in the trust and estates field should also clearly identify the attorney's client in order to avoid the common misconception by relatives of the client that the attorney is the "family" lawyer.

SCOPE OF ENGAGEMENT

Making the scope of the work performed under the terms of an engagement letter as broad as possible is a natural reaction. This is often based upon the misguided theory that a broad engagement letter will generate additional legal work. In fact, an engagement letter with a loosely defined scope of the work covered does little more than expose an attorney to potential liability well outside the range of services he or she intended to perform. As outlined in Model Rule 1.2(c), it is perfectly acceptable for a lawyer to reasonably limit the terms of the engagement, provided the client is aware of the limitations and gives his or her informed consent.

A plainly worded provision setting forth the defined scope of the services to be performed is one of the most important risk management tools an attorney can adopt. If the intended engagement does not include appeals, the engagement letter should say so. If the attorney represents the executor but an accounting professional is separately retained by the estate to prepare the estate tax returns, spell it out in the engagement letter. If the ongoing representation expands beyond its original scope, a simple amendment to the original agreement will suffice. It is a sensible idea to set forth in this section of the engagement letter the allocation of responsibility between the attorney and client in order to apprise the client of his or her role in the success of the representation.

TERMS OF PAYMENT

The engagement letter must also set forth the monetary terms of payment and should include the frequency of payment, the definition of the expenses for which the client will be responsible and a realistic outline of the steps involved in the course of the representation, together with the time frame within which the client may expect to know the outcome of the retention. Misunderstandings over fees are a constant source of nonpayment or, worse, malpractice claims and grievances. An estimated budget of the cost of the representation—subject, of course, to revision as the matter proceeds and unanticipated events occur—will go a long way toward avoiding the misunderstandings that can cause a breakdown in the client-attorney relationship. If an attorney is concerned that a client will not retain the attorney if a realistic cost estimate is provided up front, the attorney should know that the client is never going to be happy with the services rendered as fees mount beyond the client's expectations.

If it is anticipated that the compensation spelled out in the engagement letter will change during the representation, the attorney should advise the client in the engagement letter of the circumstances warranting any increase in fees and the parameters of any projected change. In addition to the fact that Rule 1.5 states that "[a]ny changes in the basis or rate of the fee

or expenses shall also be communicated to the client," many jurisdictions will exercise a high degree of scrutiny to changes in the terms of compensation that are not detailed in an engagement letter, particularly where the changes inure solely to the benefit of the attorney. Additional factors that may negate the ability to change the terms of compensation include the sophistication of the client and the timing of the requested change.

Rule 1.5(a) provides that an attorney may not charge "unreasonable" fees or expenses. The factors that weigh in on reasonableness include these:

- The time and labor required
- The novelty of the issue presented and the skill required to perform the requested tasks
- The extent to which the engagement would preclude the attorney's ability to service other clients
- The usual and customary fee for similar services
- The amount involved and the results obtained
- The time limitations imposed by the client or the circumstances
- The nature and length of the client-attorney relationship
- The experience and reputation of the attorney
- Whether the fee is fixed or contingent

The entire list of rules can be found at **americanbar.org** in ***Model Rules of Professional Conduct***.

No single factor is determinative. The key to the reasonableness of the fees provided for in the engagement letter is the client's understanding of the amounts charged and the reasons for the fee structure. However, even if a client has provided his or her informed consent in advance, a fee that is disproportionate to the work performed will not be allowed and may form the basis for a grievance and order of restitution.

The engagement letter should also spell out the consequences of the failure to pay in a timely manner the legal fees invoiced to the client. The tolerance a law firm may have for unpaid invoices may differ from client to client, but keeping track of troublesome accounts receivable and taking appropriate action if requests for payment are ignored is an important function of law firm management. Suits for unpaid legal fees will provoke retaliatory claims of malpractice. While the ability of a law firm to extricate itself from an engagement may depend upon the jurisdiction and the nature of the representation, the client should be informed in the engagement letter that nonpayment will result in withdrawal. Many jurisdictions require attorneys to advise their clients in the engagement letter of the existence of client-attorney fee dispute and conciliation programs.

STAFFING THE REPRESENTATION

The most productive relationships are based upon the client's trust and confidence in a particular attorney. Letting the client know which attorneys will be representing him or her is therefore important. However, circumstances and even the subject matter of engagements regularly shift with time. As a result, while the engagement letter should identify the attorneys the initial drafter anticipates will be involved, the law firm should reserve the right to appropriately staff the work to best represent the client.

CLIENT COMMUNICATIONS

The frequency and means by which the attorney will apprise the client of the status of the proceedings should also be outlined in the engagement letter. Model Rule 1.4 requires that the client be kept reasonably informed of the status of the matter. While email has become a common means of communication, attorneys must caution their clients that no attorney-client privilege will attach to substantive client-lawyer communications made under

circumstances where there is a significant risk that the communications will be read by a third party. (ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 459 (2011).)

CONFLICTS

If it is apparent that an actual or potential conflict of interest exists, the manner in which the conflict is being addressed should be set forth in the engagement letter. Keep in mind that not every conflict can be waived and that the consequences of failing to adequately analyze a conflict can be devastating to both the client and the law firm. Assuming the existence of a conflict, the client's informed consent must be obtained for any waiver to be effective.

DOCUMENT AND FILE RETENTION

Given the obligation imposed upon attorneys to take affirmative steps to ensure a litigation hold is in place and that data is preserved from the moment it becomes reasonably evident a dispute exists, reference to the client's role in the preservation obligation should be spelled out upon engagement. While the details of the client's obligations should be outlined in a separate document (and reiterated throughout the engagement), a cursory reference to the need for the client to safeguard data and cease routine document destruction policies is warranted.

Finally, few jurisdictions delineate precise guidelines on how long an attorney is obligated to maintain a file generated during the course of representing a client. Outlining the attorney's document retention policy in an engagement letter is the first step in the process of advising the client that copies of the file will only be held for a finite period. Again, the rules on retaining files vary among jurisdictions, and attorneys must be sure to comply with the local requirements.

CONCLUSION

There is no question that the administrative obligations placed upon attorneys have increased exponentially over the years. However, the time taken to draft a clear and unambiguous engagement letter will repay the attorney many times over by fostering a good relationship with the client, increasing the likelihood of prompt payment for services rendered and reducing the possibility of a malpractice claim or grievance.