Engagement Agreements with Clients: How to Comply with the Ethics Rules and Protect Yourself from Claims

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Summary Outline

• Ethics Requirements Governing Engagement Agreements
  – When is a written agreement required?
  – When required, what must it include?
  – What must not be included in an engagement agreement?
  – Consequences of non-compliance

• Best Practices for Engagement Agreements

• How Engagement Agreements Can Impact Malpractice Claims Against Lawyers
When an Engagement Agreement is Required

• A written engagement agreement is required if the lawyer will be working on a contingency fee basis—Rule 1.5

• A written agreement is *sometimes* required in non-contingency cases
  - New clients: DC, AZ, CO, CT, GA, NJ, PA, RI, WI
  - CA: new clients (except corporations) AND fees in excess of $1,000
  - NY: new clients (in most cases), domestic relations matters
When an Engagement Agreement Is Required, What It Must Include

• Requirements vary from state to state.

• For example, DC Rule 1.5(b) requires that the following be communicated to the client “in writing”
  o “the basis or rate of the fee”
  o “the expenses for which the client will be responsible”
  o “the scope of the lawyer’s representation”

• But Model Rule 1.5(b), adopted in many states, requires that these issues be “communicated to the client, preferably in writing” (emphasis added)

• Check the rule in your jurisdiction
What an Engagement Agreement Must Not Include

- Unreasonable fees—Rule 1.5(a)
- A fee in a domestic relations case that is contingent on the outcome—Rule 1.5(d)
- A contingent fee in a criminal case—Rule 1.5(d)
- A division of the fee between different firms unless:
  - Proportional, client agrees in writing, and total fee is reasonable
- Limits on malpractice liability—Rule 1.8(h)(1)
- RI, MO: if not paid, ceasing work without withdrawing
- DC Rule 1.2, cmt. 5: surrendering right to terminate lawyer or to settle a case that the lawyer wants to continue
Potential Consequences of Non-Compliance

• You may not be able to collect a contingency fee

• You may be sanctioned
Other Recommended Provisions for Engagement Agreement

- Waivers of current conflicts of interest
- Annual fee increases
- Interest on past due fees
- Consent/waiver regarding law firm’s communications with in-house counsel
- Lawyer’s ability to withdraw if not paid on time
- A client signature
Other Recommended Provisions for Engagement Agreement

• In multiple client representations:
  o Use of confidential information
  o What happens if a conflict arises

• Representing an organization:
  o Precise name of the entity
  o Affiliates and constituents are not clients

• Employment claims:
  o Avoid employer-provided email, see ABA Formal Opinion 11-459 (Aug. 4, 2011)

• Conflict waivers—Rule 1.7(b)(4)

• Control by insurer—ABA Formal Op. 96-403 (Aug. 2, 1996)
Other Recommended Provisions for Engagement Agreement

• Cooperate with lawyer and provide material information
• Lawyer’s policy regarding file retention and destruction
• Choice of law clause
• Though not necessarily recommended, an arbitration clause is permissible in some jurisdictions
  o But see Ohio Opinion 96-9
• Client consents to use of electronic communications
Impact on Malpractice Claims and Other Proceedings—generally

- Whether or not an engagement agreement is ethically required, it can have an enormous impact on a legal malpractice case, a lawyer disciplinary action, or a disqualification proceeding.

- So, too, can the lack of an engagement agreement.
Impact on Malpractice Claims and Other Proceedings – Generally

• By carefully defining the attorney-client relationship in an engagement agreement lawyers can protect themselves from some legal malpractice claims.
  o Identify a lawyer’s client
  o Define the scope of the lawyer’s duty
  o Identify the law firm responsible for the engagement
  o Memorialize the client’s consent to waive conflicts of interest
  o Determine the applicable law
  o Determine the applicable forum
Identity of Client

• Non-clients may view themselves as clients.

• By identifying the client with precision, an engagement agreement can be helpful defending claims by non-clients.

• Engagement agreement may also state that there are no third party beneficiaries of the engagement.
Identity of Client

• Claims by non-clients can arise in multiple contexts:
  o Client wearing multiple hats.
  o Representing a closely-held corporation, but not its shareholders
    ▪ See Model Rule 1.13
  o Representing a corporate entity, but not its parents, subsidiaries, or affiliates
    ▪ See ABA Formal Opinion 95-390
• Example: lawyer represents Corporation A in litigation. The Court rules against Corporation A with respect to a legal issue that also could affect the business of Corporation B, which is owned by Corporation A’s parent, Corporation C. Corporation A alleges malpractice. Corporations B and C join as plaintiffs and allege that they, too, were damaged.
Identity of Client

• Other sources of claims by non-clients:
  o Representing an underwriter when legal fees are paid by the non-client issuer
  o Representing lead lender in syndicated loan, not other lenders
    ▪ *See, e.g, Dorsey & Whitney, 745 N.W.2d 538 / 553 F.3d 609*
  o Representing lead underwriter in an offering, not other underwriters
  o Representing a testator, not family members/beneficiaries of the will
  o Representing a business owned by an individual in a transaction, not family members who someday will own and control the business
Identity of Client

• Defining the client with precision can also prevent a lawyer from being disqualified from other representations
  
  o *See Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1004 (W.D. Wash. 2007)
Identity of Client

- Practice Tip: Pay Attention to Client’s Billing Guidelines
- Some client “billing guidelines” purport to expand the attorney-client relationship beyond what the engagement letter specifies
  - Lawyer representing company also represents all affiliates
    - Address this in the engagement agreement:
      - Agreement trumps guidelines
      - Exclude objectionable guideline provisions
    - Other objectionable guideline provisions:
      - Expanding conflicts of interest to cover business competitors
      - Client may change guidelines unilaterally in the future
      - Lawyer must indemnify client
      - Data security audits of the law firm
Scope of Representation

• By specifying the subject matter of the representation with particularity, an engagement letter can be helpful evidence in defending a legal malpractice claim regarding matters beyond the scope of the engagement.
  
  o AmBase Corp. v. Davis Polk & Wardwell, 866 N.E.2d 1033 (2007)
  
  

• In many jurisdictions, any limitations on scope must be “reasonable under the circumstances” and “the client must give informed consent”—Model Rule 1.2(c)
  
  o But see DC Rule 1.2(c)—no reasonableness requirement
Identity of Counsel

• By specifying which law firm is entering into the attorney-client relationship, an engagement letter can be helpful evidence in defending a legal malpractice claim against a law firm that did not actually represent the client.

  – Multi-firm lawyers
  – Lawyers transitioning between firms
Advance Conflict Waivers

• Legal malpractice claims, or breach of fiduciary duty claims against lawyers, often arise from alleged conflicts of interest.

• An advance waiver in an engagement letter may prevent or help to defend against claims based on conflicts.
Conclusions

• Check applicable ethics rules and ethics opinions in your jurisdiction to ensure compliance.

• Engagement agreements can be valuable tools for avoiding unnecessary liability.

• They can be helpful in many contexts, including legal malpractice claims and breach of fiduciary duty claims.

• Equally importantly, well-drafted engagement letters can prevent disputes or misunderstandings with the client and can prevent claims before they arise.

• A lawyer undertaking a new matter should give careful attention to the terms of the engagement letter, including the identity of the client and the scope of the matter.

• The lawyer should also pay careful attention to client billing guidelines and expressly exclude any objectionable provisions in the engagement agreement.