

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”
 - “the basis or rate of the fee”
 - “the expenses for which the client will be responsible”
 - “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
 - *See, e.g., Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 796 A.2d 238 (N.J. 2002).
- You may be sanctioned
 - *See, e.g., Statewide Grievance Comm. v. Dixon*, 772 A.2d 160, 166 (Conn. App. Ct. 2001)

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:
 - Use of confidential information
 - What happens if a conflict arises
- Representing an organization:
 - Precise name of the entity
 - Affiliates and constituents are not clients
- Employment claims:
 - 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
 - See *Sanford v. Bracewell & Giuliani, LLP*, 6 F. Supp. 3d 568 (E.D. Pa. 2014)
 - *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.
 - Identify a lawyer's client
 - Define the scope of the lawyer's duty
 - Identify the law firm responsible for the engagement
 - Memorialize the client's consent to waive conflicts of interest
 - Determine the applicable law
 - 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:
 - Client wearing multiple hats.
 - *See, e.g., Hallman v. Kantor*, 2010 WL 3547427 (2010)
 - Representing a closely-held corporation, but not its shareholders
 - *See* Model Rule 1.13
 - Representing a corporate entity, but not its parents, subsidiaries, or affiliates
 - *See* ABA Formal Opinion 95-390

Identity of Client

- 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:
 - Representing an underwriter when legal fees are paid by the non-client issuer
 - *See, e.g., International Tele-Marine Corp. v. Malone & Assocs.*, 845 F. Supp. 1427, 1432-33 (D. Colo. 1994)
 - Representing lead lender in syndicated loan, not other lenders
 - *See, e.g., Dorsey & Whitney*, 745 N.W.2d 538 / 553 F.3d 609
 - Representing lead underwriter in an offering, not other underwriters
 - Representing a testator, not family members/beneficiaries of the will
 - 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
 - *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.
 - *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033 (2007)
 - *Kansas Public Employees Retirement System v. Kutak Rock*, 44 P.3d 407 (2002)
 - *SCB Diversified Mun. Portfolio v. Crews & Associates*, 2012 WL13708 (E.D. La. 2012), *aff'd* *Coves of the Highland Community Dev. Dist. v. McGlinchy Stafford, P.L.L.C.*, 526 F. App'x 381 (5th Cir. 2013).
- 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)
 - *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.