ENGAGEMENT LETTERS: A LAWYER'S BEST FRIEND, BY: DONALD PATRICK ECKLER, ESQ., AND ALICE M. SHERREN, ESQ.

After running a conflicts check, the most basic task in forming a new client relationship is preparing and having an engagement letter executed. Proper engagement letters can minimize disputes with clients during the course of the representation, make it easier to collect fees owed, and provide the first line of defense should a malpractice claim be asserted.

Engagement letters are more than a mere formality. Proper engagement letters set the tone for the representation and delineate the payment plan and the scope of the representation. An engagement letter that properly defines the scope of the relationship, including who is to be represented, and what work the professional is agreeing to undertake, is key to avoiding or defending many malpractice claims. As third party claims rise, even from those who were adverse to the client, the engagement letter becomes all the more important.

A few minutes at the beginning of a relationship can help minimize or avoid years of litigation after a relationship has ended. This article will discuss how to use engagement letters to avoid claims and how to use them effectively in litigation should a claim be filed.[1]

Discussion with the Client

The enthusiasm for a new assignment should not cloud an attorney from the necessity of an engagement letter. Engagement letters with new clients can avoid misunderstandings about payment, whom the lawyer owes a duty to, and what the lawyer is being retained to do. Engagement letters are especially important when taking on new work for longstanding clients to avoid confusion about what the attorney has agreed to do (and not do) and how the attorney expects to be compensated.

Who is the Client?

One of the fastest growing areas of claims against attorneys is third party claims. These are claims made by individuals or entities with whom the professional did not have a direct relationship. Defending this kind of claim is often necessarily dependent upon the definition of the client in the engagement letter. Who the client is, and who the client is not, should be set forth clearly in the engagement letter. The letter should define that duties are only owed to the client and are not intended for the benefit of any other individual or entity. While such definition in the engagement letter is not foolproof, especially in estate planning situations, it does provide a much better argument for the professional should he be sued.

Scope of Representation

Engagement letters should clearly define the scope of representation, both what the attorney is agreeing to do and what the attorney is not agreeing to do. A version of ABA Model Rule 1.2(c), which allows a lawyer to limit the scope of the engagement after the client has given informed consent, has been adopted by most states. This is most often done in a paragraph of the engagement letter defining the scope of the engagement and is critical to include in situations in which the lawyer has only agreed to take on a portion of the work that the client may ultimately seek.

Limiting the scope of representation is common in a situation which is pre-suit. An attorney might agree to attempt to resolve the dispute pre-suit for a certain fee arrangement, and wish to renegotiate the scope of the representation and payment should a lawsuit actually be required. The limitations on representation should be fully discussed and agreed to by the client before the representation begins. In situations in which expansion of the engagement is not anticipated from the beginning of the relationship, attorneys should be attuned to the scope of the representation they originally agreed to, and if there is an expansion that is necessary, tender a revised engagement letter that defines the expanded scope of the relationship.

In routine transactional work, the lawyer should specify which documents and tasks he or she will analyze and draft, and which tasks the lawyer is not agreeing to perform. For example, in drafting an estate plan a lawyer might specifically state that he or she is not responsible for preparing or filing estate tax returns. This basic prophylactic step can be used to effectively defend a claim made by the client that the attorney was expected to do work that was not set forth in the engagement letter.

Avoiding fee Disputes

One of the quickest ways to draw a malpractice claim or a complaint to the state bar is to have a fee dispute with a client. Suing a client for unpaid fees is often a recipe for a counterclaim for malpractice. In addition, trying to collect fees without an engagement letter is no easy task. Juries and ethics boards do not look favorably upon lawyers who appear to have taken advantage of their clients. A clear engagement letter indicating the lawyer and client discussed and agreed to the scope of representation and payment plan can avoid such an appearance.

ABA Model Rule 1.5 defines an unreasonable fee and many states further regulate by statute the fees that attorneys can recover in particular cases, specifically, medical malpractice and workers' compensation cases. These rules are clear and not the source of much dispute. Where disputes often arise is in the commercial litigation context where fees may be blended between contingency and hourly rate, where a contingency fee is based upon an amount of savings to the client, or regarding whether payment for vendors and experts is

"One of the quickest ways to draw a malpractice claim or a complaint to the state bar is to have a fee dispute with a client."

PROFESSIONAL LIABILITY DEFENSE QUARTERLY
is published by:
Professional Liability Defense Federation
1350 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
(612) 481-4169

ENGAGEMENT LETTERS, CONT'D

to be advanced by the attorney or paid by the client. Discussing these issues with the client before the engagement, specifically setting forth the manner in which fees or costs are to be paid, and sticking to the agreement throughout the engagement with the client can avoid disputes. This is not only in conformity with the ethical requirements attorneys have, it is good business.

Retainers

Carefully negotiated retainer agreements within engagement letters can avoid fee disputes. There are generally three different kinds of retainers: 1) classic retainers, 2) security deposit retainers, and 3) advance deposit retainers. The classic retainer is earned in its entirety by the attorney upon payment and is placed in the operating account. When paid, the client relinquishes all interest in the classic retainer. A security retainer is a payment for prospective services, where the client retains an interest in the funds until the services are actually rendered. The attorney holds the funds in the trust account in escrow for the client and moves the funds into the attorneys' operating account when the funds are earned. A security retainer can be an eroding retainer or a retainer against the final bill. In the case of an eroding security retainer only the billed amount should be moved from the trust account to the operating account upon issuance of the bill. In the case of a retainer against the final bill, the money is held until the final bill in a matter is issued and during the course of the representation the client is billed and expected to pay over and above the retainer.

This second type of security retainer is often not understood by clients. If a retainer against the final bill is to be used, it should be thoroughly explained to the client at the outset of the relationship and it should be clearly reflected in the engagement letter. In addition, the office attorneys' billing staff should be made aware of the type of retainer involved in a given case. In situations in which the attorney has more than one matter with a client, it should also be made clear which retainer applies to which matter and under which terms. Nothing will end a relationship faster than a client with a security retainer getting a bill and not understanding that he is expected to pay it notwithstanding the retainer.

Finally, an advance payment or flat-fee retainer involves fees paid as compensation for services to be rendered in the future, however payment passes to the attorney whether the service is actually rendered or not. The advance payment retainer is prohibited in several jurisdictions and heavily regulated in many jurisdictions in which it is permitted.

In addition to determining the kind of retainer, attorneys and clients should discuss and agree to the amount of the retainer and how fees above the retainer will be billed and collected. Properly evaluating the cost of handling a matter and obtaining security that the client can fund the matter can avoid fee disputes or the need to withdraw from a matter for lack of payment. Ascertaining the ability of the client to pay for the representation can be uncomfortable but is essential to protecting the attorney client relationship. Lawyers deserve to be paid for their work, and clients who resent being asked to pay their legal fees (or who lack the funds to pay such fees) are more likely to bring malpractice claims. It is often best to decline representation entirely if the lawyer and client cannot agree on how the representation will be funded.

Splitting of Fees with Other Lawyers

Referrals are the lifeblood of many attorneys' practices. Until the last several decades referral fees were verboten. Though they are now permitted, there are clear and strict rules that must be followed for attorneys in separate firms to split a fee. Model ABA Rule 1.5(e) requires that any fee split be proportional to the work done by each attorney, that the fee split be in writing with consent from the client, and that the overall fee be reasonable. Fee disputes between referring and receiving attorneys are disfavored by courts and time consuming for the lawyers involved. Referring and receiving attorneys should work together to have a mutually agreeable written arrangement signed by each client that is referred.

Terminating the relationship

Misunderstandings about whether the representation has concluded can also lead to malpractice claims. Such misunderstandings can be minimized or avoided by sending termination letters to the client when the representation has concluded. While it is relatively simple in most litigation matters to define when the representation has concluded, transactional matters often present a trickier analysis. This is particularly so in estate planning matters. Years after the estate documents are drafted a client may seek modification of those documents. Clearly defining that the original engagement had ended and that any more work would be a new engagement is critical to be able to argue that any errors in drafting the original documents occurred years prior. This can be essential to arguing that the statute of limitations or statute of repose had expired and that no ongoing duty continued because the relationship had been concluded.

Conclusion

It is often said that happy clients do not sue their lawyers. At the onset of representation, the idea of a dispute between the lawyer and client can be the furthest thing from anyone's mind. It is important to have the hard conversations with potential clients (or existing clients for whom you are taking on additional

"Misunderstandings about whether the representation has concluded can also lead to malpractice claims."

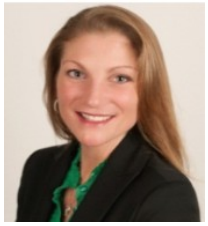
ENGAGEMENT LETTERS, CONT'D

work) before beginning the representation. Being clear in engagement letters concerning the scope of representation and how the representation will be funded can go a long way toward a healthy attorney-client relationship.

Endnote

1. It is important to note that this article is focused on the ABA Model Rules and not the rules of any particular state. As rules may be different, careful consultation with the governing rules is advised.

Donald Patrick Eckler, Esq., is a partner at **Pretzel & Stouffer, Chartered**, who handles civil disputes across **Illinois** and **Indiana**. Pat manages complex litigation involving doctors, lawyers, architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and other professionals in professional negligence cases. He may be reached at deckler@pretzel-stouffer.com.



Alice M. Sherren is a Claim Attorney with **Minnesota Lawyers Mutual Ins. Co**. Since joining MLM, Alice directs the defense of LPL claims, and speaks on legal malpractice, risk management, and ethics matters and has authored many articles. Earlier, Alice was a Minneapolis litigator for nearly a decade. She is a member of the Minnesota State Bar Association and serves on the Professionalism Committee.