First Line of Defense

Engagement Letters, Nonengagement Letters, and Disengagement Letters

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Not having the same understanding as a client of the terms of an engagement can have serious ramifications.

Engagement letters, or engagement agreements, are like underwear: they usually aren't very sexy, but they are an important part of the foundation. When you start the day with good underwear, you're more confident. When you start a relationship with a client with a good engagement letter, you can be more confident that fewer misunderstandings will interrupt that relationship. As for the other side of the coin, you should feel more confident that you have avoided misunderstanding when you decline representation if you have written a nonengagement letter. Finally, writing a disengagement letter is always good practice, even if an engagement letter specifies when your representation of a client will end. Before you write such letters, you will want to understand their ins and outs.

Engagement Agreements

The engagement letter is the professional's first opportunity to develop a rapport with, and a set of clear expectations for, the client. It can help identify responsibilities and the scope of the engagement, and document key terms and conditions that will help avoid misunderstandings, disappointment, and ultimately, claims against professionals. Although the authors' experience has been primarily with lawyers, these comments are generally true for any professional; but forgive us if we lapse into the occasional attorney–client language.

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Limit the Scope of Representation

Written engagement letters, or engagement agreements, are not always required by professional rules, but best practices dictate that they be used in every new professional engagement. The American Bar Association (ABA) Model Rules of Professional Conduct state:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

Model Rules of Prof'l Conduct R. 1.5(b) (emphasis supplied). *But cf.* Ct. Rule 1.5(b) (engagement agreement *shall* be in writing); Ga. Rules of Prof'l Conduct R. 1.5(c) (contingency fee agreements *shall* be in writing).

As noted in the rule, the scope of the representation can and should be included in a representation agreement. Is an architect providing blueprints for an addition to a building, a renovation of that building, or both? Is an accountant providing individual tax advice, corporate tax advice, or both? In a divorce case, taxes, no doubt, will be a significant issue. If the divorce lawyers are not providing tax advice, they should say so in the engagement agreement. Similarly, we can envision business deals where tax advice, employment advice, product liability advice, and more would be warranted. It is easy to see how different parties to the relationship could expect the relationship to have a different scope. Most courts and juries will find in favor of the client's interpretation unless there is compelling evidence, such as a written engagement agreement, supporting the professional's understanding of the scope of the relationship. This is especially true in the case of lawyers because "lawyers do paper," so we are expected to document our understanding in writing.

In *Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 A.D.3d 1026, 93 N.Y.S.3d 353 (N.Y. App. Div. 2019), the New York Supreme Court, Appellate Division, issued a decision finding that a firm's written engagement agreement precluded the client's later malpractice suit. The law firm agreed to "investigate and consider options that may be available to urge administrative reconsideration of" the client's dismissal from the New York College of Osteopathic Medicine. *Id.* at 1028. After the college refused to reconsider the client's dismissal, the client sued the law firm, complaining that it did not negotiate with or sue the school. In affirming the dismissal of the client's claim, the court looked carefully at the terms of the agreement.

> The letter of engagement conclusively demonstrated that there was no promise to negotiate. There was only a promise to investigate and consider whether there were any options possibly available to urge the school to reconsider the plaintiff's expulsion. Anything else, including the defendant's failure to commence litigation against the school and the defendant's alleged rendering of legal advice regarding the efficacy of the plaintiff's commencing a defamation action against others, was outside the scope of the letter of engagement.

Id. at 1029.

Similarly, in *Jones v. Bresset*, 47 Pa. D. & C. 4th 60 (2000), the court found that a Pennsylvania attorney successfully limited his potential liability to a client by limiting, in the engagement letter, the scope of his employment. (This case has a good overview of professional rules and legal decisions from a number of states across the country.) *See also* Pa. Bar Ass'n Legal Ethics & Prof'l Resp. Comm. & Phil. Bar Ass'n Prof'l Guid. Comm., Joint Formal Op. 2011-100 (2011).

In contrast, a Nevada plaintiff sued her attorney for failing to file a personal injury action after she attended a consultation about that personal injury. The lawyer said she agreed to evaluate the case, but the lawyer told the client that she would not bring the action. Since the attorney did not have a written agreement limiting her representation, the court found a jury issue on the scope of her obligation to her client. *See Allyn v. McDonald*, 910 P.2d 263, 265 (Nev. 1996).

In the medical context, the written, informed consent form is much akin to an engagement letter. In Ohio, for example, the informed consent statute requires that a written consent form set forth in general terms the nature and purpose of the procedure, what it is expected to accomplish, any reasonably known risks, and the names of the physicians who will perform the procedure. The person giving the consent must acknowledge that such disclosure of information has been made and that all questions asked about the procedure have been satisfactorily answered and must sign the consent. *Joiner v. Simon*, 2007-Ohio-425, 2007 Ohio App. Lexis 372 (2007). The scope of the engagement, what can reasonably be expected from the engagement, and the agreement of the patient to the engagement are in this way established by a written document that can later remind or inform either party what the original agreement was.

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And in the architect and engineering context, a written engagement agreement can help define whether the services rendered are architectural or engineering. *See generally Rosen v. Bureau of Prof'l & Occupational Affairs*, 763 A.2d 962, 2000 Pa. Commw. Lexis 685 (Pa. Commw. Ct. 2000).

Consider using an engagement letter with every professional relationship. They permit you to define the beginning point, objectives, scope of work, payment terms, and end point. You might think it obvious that an employment attorney is not responsible for handling a car accident or that you expect to be paid within a reasonable time after a bill goes out, but clients seldom see the professional relationships through the same narrow lens. This is especially true when there has been an unwanted development.

Stating up front, before either the professional or the client has acted based on an understanding, for whom the professional is acting can avoid many headaches and misunderstandings down the road.

Define the Client

An engagement agreement also allows the professional to define who the client is. While it is a subject worthy of its own article, defining the client is critical to legal representation and is not as simple as people think. Hopefully, the engaged lawyer doesn't represent everyone. And a lawyer cannot represent a "deal" or no one. *See Black's Law Dictionary*, s.v. "attorney" ("one who is appointed and authorized to act in the place or stead of another…"). A lawyer always represents an entity. That entity, though, can be ABC Corp., ABC Corp.'s board of directors, ABC Corp.'s shareholders, or any number of other possibilities. Stating up front, before either the professional or the client has acted based on an understanding, for whom the professional is acting can avoid many headaches and misunderstandings down the road. *See Wortham & Van Liew v. Superior Court*, 188 Cal. App. 3d 927, 233 Cal. Rptr. 725 (1987) (holding that an attorney for partnership represents all partners). *And see United States v. American Tel. & Tel. Co.*, 1979 U.S. Dist. Lexis 12959 (D. D.C. 1979) (holding that the privilege of a corporation extends to all employees who had communication relevant to the incident and which communication was a necessary incident of the employee's employment).

This principle also is true for other professionals. For example, an engineer retained by an insurance company to inspect an insured's home for mold could represent the insurance company, the insured, or both. *See generally Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48 (Pa. 2014).

Fees

Having to sue a client for fees is an unpleasant undertaking for any professional, and often, it will result in malpractice counterclaims. Such a course should be avoided whenever possible. Professionals can use their engagement agreements to avoid fee disagreements in the first place and win them if they are unavoidable. Fee agreements can set out the services for which the professional will charge. Recently, for example, one of the authors retained a lawyer as an expert witness. The engagement agreement for that lawyer said that calls or emails from the client would be returned by someone from the lawyer's office within twenty-four hours, but the client would be charged the regular hourly rate, based on tenths of an hour increments, at a minimum of two-tenths of the hourly rate, for every returned message. That very clearly informed the client that the communication would be frequent if that is what the client wished, but the client would be expected to pay for that communication. Having a similar provision in an engagement letter may or may not reduce the bill, but it will reduce the uncertainty and surprise about the bill, which, in turn, should reduce the number of unpaid bills. Use an engagement agreement to define clearly the fee structure and expectations about fee payment.

The engagement agreement can make clear when payment is expected. For example, Georgia courts have upheld provisions requiring a client to raise any objection to a bill within thirty days of its receipt. *Dikeman v. Mary A. Stearns, P.C.*, 253 Ga. App. 646, 560 S.E.2d 115 ((2002); *Loveless v. Sun-Steel, Inc.*, 206 Ga. App. 247, 424 S.E. 2d 887 (1992). The agreement could also clearly state that it is expected that fees will be paid within thirty days of the invoice date, and if they are not, interest at a specified rate will be added. The interest rate selected must be fair and reasonable. *Kutner v. Antonacci*, 16 Misc. 3d 585, 837 N.Y.S.2d 859 (Nassau Cty. Ct. 2007).

Disagreements

Hopefully, we can avoid disagreements with our clients; however, wise attorneys may wish to consider including either an arbitration or an indemnification provision in engagement agreements as a precautionary measure.

Arbitration

One term that we are seeing more frequently in engagement agreements is an arbitration provision. Some are limited to fee disputes; others apply to all disputes between the professional and client. Most states have an arbitration code that, like the federal code, clearly favors arbitration. *See* Ga. Code Ann. §9-9-1; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *Order Homes, LLC v. Iverson*, 300 Ga. App. 332, 334–35 (2009). The states are divided, however, about how these codes should be interpreted within the attorney–client relationship.

Some, such as Georgia, have held that a provision is enforceable as written as long as it is not unconscionable. *Summerville v. Innovative Images, LLC*, 349 Ga. App. 592, 826 S.E.2d 391 (2019), *cert. granted*. *Accord Smith v. Lindemann*, 710 Fed. Appx. 101 (3rd Cir. 2017) (holding that there was no reason that arbitration provisions in attorney–client engagement agreements should not be enforced); *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (holding that arbitration provisions were enforceable because "[p]rospective clients who enter such contracts are legally protected to the same extent as other contracting parties from, for example, fraud, misrepresentation, or deceit in the contracting process."); *Watts v. Polaczyk*, 242 Mich. App. 600, 619 N.W.2d 714 (2000) (involving a dispute over the enforceability of an arbitration provision in an attorney engagement contract and holding that statutes favoring arbitration were

binding policy, over and above informal ethics opinions); *Derfner & Mahler, LLP v. Rhoades*, 257 A.D.2d 431 (N.Y. App. Div. 1999) (confirming arbitration award and holding that public policy considerations do not require that claims of lawyer malpractice be adjudicated solely in the courts, so arbitration agreements are enforceable).

Others limit a lawyer's ability to contract up front for arbitration. These states, and the ABA, have found that the professional and fiduciary obligations that govern attorneys and the legal profession, including the duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," require the lawyer to give an explanation of the clause before asking a prospective client to sign. Ga. Bar Rule 1.4(b).

> Because the attorney–client relationship involves professional and fiduciary duties on the part of the lawyer that generally are not present in other relationships, the retainer contract may be subject to special oversight and review. The authority for this oversight comes from the Model Rules, which impose rigorous disclosure obligations on the lawyer and expressly limit and condition the lawyer's freedom to enter into contractual arrangements with clients.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002) (discussing retaining agreements requiring arbitration of fee disputes and malpractice claims). *Accord Owens v. Corriqan*, 252 So.3d 747, 751 (Fla. Dist. Ct. App. 2018) ("[T]he contract here at issue is different than the garden variety commercial contract [because l]awyers owe ethical obligations and duties to their clients that exceed what the common law requires of arm's length contracting parties."); *Snow v. Bernstein*, *supra*, 176 A. 3d 729, 734 (Me. 2017) (denying attorney's motion to compel arbitration, despite state legislature's strong policy favoring arbitration, where he failed to communicate adequate information and explanation to obtain the client's informed consent as required by Maine's Rules of Professional Conduct); *Castillo v. Arrieta*, 368 P.3d 1249, 1252 (N.M. 2016) ("An arbitration clause in a fee agreement between attorney and client implicates unique legal and ethical concerns."); *Hodges v. Reasonover*, 103 So. 3d 1069, 1078 (La. 2012) (holding that arbitration clauses in attorney–client fee agreements are enforceable only if "full and complete disclosure of the potential effects of the arbitration clause [have been made], including the waiver of a jury trial, the waiver of the right to appeal, the waiver of broad discovery rights, and the possible high upfront costs of arbitration.").

Assuming that your state permits arbitration, you should consider whether you wish to include such a provision. Arbitration does have the distinct advantage of being a confidential, rather than public, proceeding. However, there are a multitude of issues and matters that could impair that confidentiality. For example, one of the parties could file suit, contending that some or all of the claims are not arbitrable. *American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88 (4th Cir. 1996) (in published Fourth Circuit opinion, enforcing arbitration); *Pompano-Windy City Partners, Ltd, v. Bear, Stearns & Co.*, 698 F. Supp. 504 (S.D. N.Y. 1988) (not enforcing arbitration). Furthermore, the right to a jury trial is waived, which may not be beneficial to a malpractice counterclaim. The right to appeal and broad discovery rights also are waived with arbitration. And, there is the high out-of-pocket costs for the arbitrator's or arbitrators' fees to consider. Finally, there is also the possibility that agreeing to an arbitration clause will defeat coverage in some aspects. For example, if the arbitration agreement provides that the prevailing party will be awarded attorneys' fees, a carrier may take the position that such fees awarded against the lawyer are a contractually incurred liability not covered by the policy. So, an arbitration clause is not necessarily a panacea, but it is a provision that professionals should consider as a dispute-resolution mechanism to include in an engagement agreement.

Indemnity

Similar to arbitration, an indemnification provision is something that the professional can consider for the engagement agreement. Most states will not permit professionals to contract away malpractice claims prospectively. Ga. Bar Rule 1.8(h); *McGuire, Cornell & Blakey v. Grider*, 765 F. Supp. 1048 (D. Colo. 1991). However, there could be an indemnification clause, for example, that required a client to pay the lawyer's attorneys' fees if the attorney prevailed in a legal malpractice suit. Commonly, a client will require the lawyer to indemnify the client if a claim arises out of the legal work done. So, for example, a collections attorney would be required to indemnify his or her debt-holder client if the debt-holder client is sued under the Fair Debt Collections Practices Act. Or a lease would require a property manager to indemnify the property owner in cases of negligence claims. Such provisions present difficult coverage and defense scenarios to carriers and defense counsel. As with the attorneys' fee provision in the arbitration agreement, most carriers would see this as a non-covered, contractually incurred liability. The professional thus has his or her own defense provided by the professional's insurance carrier but would have to pay for his or her client's defense counsel. And the client's client may want to settle the case, since it isn't that entity's money, but the professional may want to defend the case. So, the professional should take care when considering whether to include such a provision in the engagement agreement.

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Miscellaneous Engagement Agreement Provisions

Engagement agreements are, in the end, a contract, and the parties to a contract can agree to essentially whatever they want. *See*

M.J. Daly & Sons v. City of West Haven, 1997 Conn. Super. Lexis 345, 1997 WL 85244 (1997). Professionals should consider including provisions addressing the following:

- the right to withdraw or terminate;
- staffing expectations;
- guarantees (or guarantee disclaimers);
- privacy policies; and
- policies about handling files and records.

Downside to Written Engagement Agreements

We hesitate to use the word "downside" because there is no real downside to making the parameters and terms of the professional–client relationship clearer through written agreement. There are, however, some considerations that the professional should keep in mind. First, the written agreement binds the professional as it does the client. So, for example, if arbitration was agreed to, disputes must be arbitrated. And, if a fee was agreed on, that is the fee, unless the professional and the client form a new agreement.

Additionally, in some jurisdictions, written agreements extend the statute of limitations. In Georgia, for instance, a written retainer agreement means that the client has six years in which to file a legal malpractice suit. *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*, 288 Ga. 236, 703 S.E.2d 323 (2010). *Newell Recycling* was an engineering malpractice case in which the Supreme Court of Georgia held that "an implied promise to perform professionally pursuant to a written agreement for professional services would be 'written into [the contract for professional services] by the law,' [so] an alleged breach of this implied obligation would necessarily be governed by the six-year statute of limitation…." *Id.* at 237. When the written agreement or contract is incomplete, or "the promise allegedly broken stems from a purely oral agreement, the four-year statute of limitation… applies." *Id.* at 238. That added time for suit seems a reasonable cost for the number of suits that will be avoided by the certainty, clarity, and even agreement that a written engagement agreement will provide.

Nonengagement Letters

In addition to considering engagement agreements whenever representation is undertaken, you should consider a nonengagement letter when it is declined. Many a professional has seen the south side of the "versus" mark in a matter in which he or she declined the case. Make that clear. It need not be complicated. For example, it could say:

> Dear Mr. Non-Client:
> I enjoyed meeting with you recently regarding your potential claim against Mr. Smith. As we discussed, I have a possible conflict of interest. Although we did not discuss the particulars of your potential claim, it does not appear to be appropriate under the ethical rules for our firm to represent you.
>
> We must therefore decline to represent you. Under these circumstances, you should consult other counsel immediately to determine your rights and interests. Please keep in mind that you may be facing important deadlines, so you should not delay in contacting other counsel.
>
> Thank you for offering us this engagement. If we may be of service to you in other matters in the future, we hope you will contact us then.
> Sincerely,
> Lawyer of Law Firm

The point is just to ensure that the potential client knows that the professional is not handling the matter and that the client should seek assistance elsewhere. *See* Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §2.12 (2005).

Disengagement Letters

Finally, a disengagement letter is a good idea even if the engagement letter includes a specific end-time (e.g., "The Firm will represent the Client in *ABC v. The Client*. When a dismissal in that suit is filed, the representation shall simultaneously cease."). It need not be long or complicated. Indeed, a simple statement would suffice: "Since this matter is over, the Firm will close its file and provide no further assistance in it." Or it could be more expansive:

> Dear Ms. Client:
> We wish to take this opportunity to thank you for allowing us to represent you in the *Jones* matter. In order to tie up all the loose ends, we will [*outline any final matters you will address*]. In addition, you will need to [*outline everything the client is responsible for at this time*].
>
> Since this matter is now closed, we suggest that you keep all your copies of information relating to the matter in a safe place where you can easily locate them. We are closing our file, which will be kept for a period of [*X years*]. We are returning your original [*records, documents*] related to your case.
>
> We hope this matter has been concluded to your satisfaction. Thank you for allowing us to represent you in this matter. If we can be of further assistance on this or any other matter, please let us know.
> Sincerely,
> Law firm

The salient points here are that the client understands when the representation is at an end in the professional's view, and if the client needs or expects additional services, it is the client's responsibility to say so or look elsewhere.

Conclusion

Professionals are held to a higher standard than those simply engaging in a commercial enterprise. *In re Anis*, 126 N.J. 448, 599 A.2d 1265 (1992); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 499 N.E.2d 535 (1986). However, the relationship is, at bottom, a business one that merits the same considered thought and formality that any business relationship does. A professional would not agree to a buy a cell phone plan without a written agreement memorializing the fees to be charged, the phones to be covered, the length of time for which the service will be provided, and more. The foundation of his or her relationship with his or her clients should be no less clear.

Authors' Note: Many state and local bar associations, such as the Georgia Bar Association and the Milwaukee Bar Association, have form letters in online libraries that you may consult for more engagement, disengagement, and nonengagement letter examples.