Every attorney-client relationship should begin with a well-drafted engagement agreement, not simply to comply with ethical requirements, but also to reduce the risk of claims and increase the likelihood of getting paid. Few would quibble that social relationships built on solid foundations tend to be the more successful and fulfilling relationships. One need not look long to find a relationship advice article suggesting that open communication is pivotally important to developing healthy social and business relationships. Lawyers would do well applying those social norms when starting an attorney-client relationship with a client.

A healthy attorney-client relationship is built on a solid foundation based on a specific discussion with the client, followed up with a comprehensive written engagement laying out clearly for both lawyer and client what services the lawyer will provide and the manner in which the lawyer will proceed in the representation. When the attorney-client relationship starts in this manner, the client is better informed and the lawyer significantly reduces her risk of misunderstanding, an unhappy client, and ultimately a claim against the lawyer. Having a well-drafted engagement agreement focuses the client’s expectations from the outset of the representation.

What’s The Difference Between A Fee Agreement And An Engagement Agreement?

A fee agreement defines the basis or rate of fee and may be required by the ethics rules. Pennsylvania Rules of Professional Conduct (Pa.R.C.P.) Rule 1.5 lays out when a writing is absolutely required. When the lawyer has not regularly represented the client (in other words, a new client), the basis or rate of fee must be communicated to the client in writing. If the representation is based on a contingent fee, then the agreement must be in writing. Best practices require more than the “bare minimum” required by the ethics rules. An engagement agreement is much more than just a fee agreement. Lawyer relationships with their clients are in the first instance, at least, contractual relationships. Lawyers would never advise clients to enter into a business arrangement without documenting that arrangement. Lawyers should do likewise with their clients and draft their engagement agreements using contract drafting principles.

The well-drafted engagement agreement should not be a one size fits all form. Forms frequently equal absence of thought. Lawyers should give thought to who they represent, what they will do, and how they will do it every time they undertake a representation. Skipping this step in establishing the relationship is at the lawyer’s peril. Without an agreement defining who you represent, what you agreed to do, and how you do it, you risk being sued by people you did not believe you represented, for tasks which you did not agree to undertake and you make it difficult to get paid for the work you performed.

Who Do You Represent?

The first step to establishing a solid foundation for the attorney-client relationship is to articulate who you are representing and to carefully identify that client in the engagement agreement. Sometimes it’s obvious to attorney and client, but other times it may not be so clear, particularly to the client, who you are representing. This exercise of identifying the client in the engagement agreement potentially avoids misunderstandings later. If you are representing a corporation in a lawsuit or some transaction, your engagement agreement should state that you are representing the corporation’s interests and not the individual shareholders’ interests, which can sometimes diverge.

If you plan to represent the interest of more than one person or entity, you need to exercise special attention. Care should always be taken when representing entities, people with fiduciary interests (executors, trustees, etc.) or minors or others of limited capacity. Avoid identifying the client as “you”
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or “client.” Be specific. It also helps to identify the lawyers and other professionals you anticipate will work on the matter. This informs the client upfront if you intend to have others assist you. Perhaps the client in his or her mind only wants you working on the file. Having this discussion at the outset of the relationship helps focus client expectations and avoids misunderstanding later.

How Many Clients Do You Have?

If you are representing multiple parties, give serious consideration to whether and how you’ve represented either or both parties in the past. Make sure those prior representations are disclosed in writing and any potential conflicts are waived before undertaking representation. You should describe the circumstances under which you may or may not continue to represent some of the parties if their interests diverge or they disagree. You should consider using these provisions even if your multiple clients are husband and wife. Frequently, lawyers consider husband and wife as a single client, but their interests can become diverse and potentially even adverse. You should advise in the engagement agreement that anything one client shares with you will be shared with the other and you cannot keep information confidential from the other client in a multiple client representation. Further, the possibility of aggregate settlements should also be addressed, and you should describe the process involved if one is offered. Rule 1.8(g) forbids an attorney from participating in an aggregate settlement without obtaining the informed consent of all clients in a signed, written agreement. An offer cannot be accepted unless each client consents after being made aware of the share that each person will receive.

When there are multiple clients, the conflict waiver provisions are important to obtaining informed consent and avoiding a later breach of fiduciary duty claim. If the engagement agreement is also intended to serve as a conflicts waiver letter, you will need to meet the “informed consent” requirements. Getting informed consent for a conflict waiver is a process, and not just a clause in the engagement agreement. Rule 1.0 defines “informed consent” as “the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Probably the most important thing the lawyer needs to remember about informed consent is that it’s always given prospectively, but evaluated retrospectively, and it’s at the lawyer’s risk if it was not complete.

What Are You Going To Do For The Client?

The engagement agreement should clearly identify the scope of your undertaking. Equally important to identifying what you will do is identifying what you will not do. Many clients view the lawyer they hired as “their lawyer” for everything. If you do not clarify it in writing, courts may define the existence of an attorney-client relationship and the attorney’s undertaking by the client’s state of mind. If you have not undertaken a particular representation, advise the client in writing. If you undertake to represent a client in a motor vehicle accident but have no intention of representing the client in any UIM claim, workers compensation claim or social security disability matter (regardless of your reasons), you should so state in your engagement agreement. Likewise, if you represent the client in divorce and support matters, but do not want to undertake the custody matter, so state. If you are giving estate planning advice, you may wish to advise that your advice is meant to achieve their estate planning goals and will not consider their interests in marital property or domestic disputes that may later arise. Likewise, you might undertake business advice, but are not willing or able to address tax issues. If your intent is not to undertake a part of the work or if there is a limitation on your services, that should be explicitly stated in the engagement agreement. Don’t assume the client realizes it. Clients sometimes want to retain lawyers for discrete tasks, to limit their costs. A lawyer can do so, as long as the lawyer has explained the risks of such an undertaking. Pa.R.C.P. Rule 1.2(c) provides “[a] lawyer may limit the scope of the representation if the limitation is reasonable under

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the circumstances and the client gives informed consent.” The lawyer must advise the client of any significant problems a limitation might entail, the client must consent, and the fee charged must be reasonable in view of the limitation. This disclosure should be in writing.

Identify the client’s goals and define success at the outset of the representation. This helps define the undertaking. The fee agreement should explain to the client that lawyers cannot guarantee outcome or success, and also that the outcome or extent of the services needed is often out of the control of either the client or the lawyer, and may depend on the other side’s actions or the court. Except where you are charging a flat fee, the client should understand that you cannot guarantee a maximum fee. Later, in litigation that has become particularly costly because of conduct of the other side, or the court’s requirements, you don’t want to hear the words, “But you promised that this was only going to cost ‘X’ dollars.” Don’t allow a good faith estimate of fees to become a contractual obligation.

What Are The Client’s Rights And Obligations?

The fee arrangement section in the engagement agreement is the most important section from the client’s perspective. It answers the age-old client question, “How much is all of this going to cost me?” The lawyer’s goal regarding fee arrangements is to avoid fee disputes. Describe how you will be paid. Describe what the client will pay, including internal/external costs, fees charged for lawyers and other staff, and how the retainer will work. Consider using an “evergreen” or renewing retainer. Use a clear description of any rights and obligations regarding payments. If you represent the client on multiple matters, you may wish to include a statement requiring fees on all matters be kept current as a condition of continuing work. Clearly identify the rate or basis on which interest will be computed if it is to be charged. Unless you intend to commit to a rate for the duration of the representation, include a statement that you reserve the right to periodically adjust rates or costs.

Address what will happen if the client does not pay. Consider including an alternate dispute resolution method regarding payment. Some counties have fee dispute review boards. Include a provision regarding the lawyer’s right to withdraw from representation and the manner in which the lawyer’s compensation will be determined if there is a withdrawal. Similarly, include a provision regarding the client’s right to terminate the services and the method of calculating the fees to the attorney if the client elects to terminate services. Include a paragraph in the engagement agreement about what you expect the client to do, such as: be truthful and cooperative, provide all documents and information that may be relevant, including keeping you updated regarding contact and other information. If you are expecting the client to do the legwork to get documents or information and you cannot perform certain tasks until you have that information, say so. Claims against lawyers often include assertion that the lawyer should have done something, such as obtain the police report or medical records, which the lawyer understood to be a client obligation.

The agreement should advise the procedures you use to achieve confidentiality, particularly if documents and client information are stored in the cloud or transmitted via the internet. If the client elects to communicate electronically, warn the client regarding the risks inherent in email and cell phone communication, and what you

Identify the client’s goals and define success at the outset of the representation.

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can and cannot control. For instance, if the client is sending you email via their work email address, there is a chance those emails are not confidential.

If you do not meet the professional liability insurance requirements of Pa.R.C.P. Rule 1.4, you must advise the client in writing. The agreement is a good place for that disclosure.

The client owns the file materials produced during the representation, unless you have otherwise agreed. The engagement agreement is also a good place to define retention of client materials and ownership of those materials. The PBA Ethics and Professional Responsibility Formal Opinion 2007-100 provides direction. When considering retention of file materials and information related to the client, you should make certain to review the new amendments to Rule 1.15 regarding record keeping. Particularly germane to the engagement agreement considerations is the requirement that engagement agreements (Rule 1.5 writings) must be retained, along with trust account documents, for 5 years following the termination of the attorney-client relationship.

Concluding The Engagement Agreement

The last thing included in the engagement agreement is the client’s signature. What if the client won’t sign an engagement agreement, or hotly contests items in your engagement agreement? Then you are aware of the issues and the opportunity to “fix it” upfront. If the terms of the engagement agreement and your fee are reasonable, as they should be, you should consider whether you really wish to represent this client. The client who refuses to sign a reasonable engagement agreement is likely to be the same client who refuses to sign the checks paying your bill.

Ultimately, the goal with the engagement agreement is to set reasonable client expectations and to reduce the likelihood of a dispute. The engagement agreement can be a solid foundation on which to begin the relationship and protects both the client and the lawyer. However, like any relationship, if you don’t behave according to the terms, things can go awry. Don’t say in the engagement agreement you will bill monthly, then wait until the end of the matter to send a large bill. You will end up with that unhappy client. Lawyers have a continuing obligation to communicate with their clients and clients who feel you have kept them apprised are less likely to be unhappy. You work hard for that fee, and having a good engagement agreement starts the relationship right.

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