PROTECT YOURSELF: LIMITING YOUR POTENTIAL LIABILITY WITH A SOLID ENGAGEMENT LETTER

By Jonathan B. Skowron, Esq.

One of the most rewarding moments in a young lawyer's career is the day she gets her first client. In that moment, it can be easy to just cash the check and begin your zealous representation. First, however, you should give serious thought to an all-too-often rushed aspect of the attorney-client relationship: the engagement letter.

The engagement letter is the key document that will dictate what you do for your client, how you get paid, and what happens if something goes wrong. Yet, it is also often one of the last things new attorneys consider in the race to get business. This article will examine some of the typical terms of such letters and help you avoid costly pitfalls that can result when the details of representation are insufficiently defined.

1. Rule #1 of engagement letters: Have one.

Interestingly, there is no rule or law *requiring* an attorney to have a written engagement letter (though Pennsylvania Rule of Professional Conduct ("Rule") 1.5(b) does require that at least the *fee arrangement* be recorded in a writing of some kind), but forgoing one is a very bad idea, and can result in awkward, and expensive, disagreements later on. Lawyers should therefore have a written engagement letter for every client or, at the very least, an engagement "e-mail" that outlines the terms of representation.

2. Precisely identify the client.

It may seem obvious, but make sure your letter accurately identifies the client. For organizations, specify that you are/are not also representing the entity's affiliates, officers, shareholders, etc. Although a client's identity is usually more straightforward for individuals, even then, if there is any potential for misunderstanding, be clear (*e.g.,* "We will represent Mrs. Smith, but not Mr. Smith.").

3. Define the scope of your representation.

Pennsylvania Rule of Professional Conduct ("Rule") 1.2(c) provides: "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." I would go further and say that every representation *should* be limited in scope. Many disputes arise due to misunderstandings regarding the scope of work that could have been avoided by a clearer engagement letter. If you are only handling the case through trial, state that. If you are only negotiating one agreement, make that clear. If you see a potential ancillary dispute, specify whether the engagement encompasses it. On a related note, if you ever wish to change the scope of representation (*e.g.,* you decide to take on an ancillary dispute), always execute an amended engagement letter.

Avoid "open-ended" engagement letters purporting to extend to some additional, unnamed representation—*i.e.,* "in addition to the representation described herein, this agreement shall also govern any additional legal services rendered by us to you in the future." Some attorneys use such language in the hopes of getting additional business from the client; but most often, all such language does is render the scope of representation ambiguous, exposing you to potential liability. If the client likes your work, she will hire you again. Keep the scope of representation limited.

4. Clearly describe your fee.

Make sure all details regarding your fee are unambiguously described in your letter. Will you be paid hourly? Via a contingency fee? What is your rate? Do you require a retainer? What kind? There are two particular issues regarding fees that often lead to disputes when not agreed upon in advance: retainers and changes to the fee arrangement.

Retainers. The term "retainer" can mean several things: first, a refundable deposit that will be used to pay the attorney's hourly rate as work is completed; second, a "minimum fee" arrangement similar to the above, but where the "deposit" is non-refundable in the case of early completion/termination; and finally, a fee paid simply for the privilege of having the attorney available, with any hourly work to be paid separately. If you require a retainer, specify what type of retainer it is. If it is one of the latter two, make sure to use the word "non-refundable" in your letter. The Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee ("PBA") has stated that non-refundable retainers are permitted, but only when not "clearly excessive" and explicitly agreed to. *See* PBA Opinion 85-120; PBA Opinion 95-100; Rule 1.5(a).

Changes to fees. Ensure that any procedure for changing your fee arrangement is plainly described. If your rates increase annually, state that. If the percentage of the contingency fee changes at a date certain or if the case goes to trial, say so. But be wary of changing a contingency fee to an hourly fee, as at least one court has held that such a change, when within the sole discretion of the attorney, "impermissibly" burden's a client's right to settle a case. *See Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007).

5. Specify when and how costs are paid.

While attorneys commonly require clients to pay all costs in addition to the lawyer's fee, this must be stated in the engagement letter. Pay particular attention to the related language used in contingency fee arrangements—*i.e.,* are costs deducted from the client's *gross* recovery (reducing the attorney's percentage) or from the client's *net* recovery? Either is fine, as long as it's agreed upon in advance.

6. Identify the procedure for withdrawing/terminating representation.

A client can fire a lawyer at any time, Rule 1.16(a)(3), and a lawyer can also generally withdraw if he is not being paid, Rule 1.16(b)(5). Even so, it is a good idea to state this in the letter, not only to set expectations, but also to lay the groundwork in case a withdrawal is necessary later. Remember, in Pennsylvania, a court must approve an attorney's withdrawal unless the client has secured other counsel. *See* Pa.R.C.P. No. 1012.

7. Alternative Dispute Resolution ("ADR").

The PBA has stated that ADR provisions are generally permitted in engagement letters for both fee and malpractice disputes as long as (a) the terms, advantages, and potential disadvantages of the ADR are fully disclosed in writing, (b) the client is advised in writing of the ability to get independent legal advice regarding the provision, and (c) the client consents to the provision in writing. Opinion 97-140; Rule 1.5, Comment 5; Rule 1.8, Comment 14.

8. "Dis" and "Non" Engagement Letters.

Finally, consider also using "dis-engagement" and "non-engagement" letters. The first is a letter stating that representation has ended, and can merely be a cover letter to your final invoice, or even an e-mail. This again helps to avoid future disputes regarding the scope of your work. In contrast, a non-engagement letter is a communication to a party that you have chosen *not* to represent. Again, this can simply be an e-mail in which you say you enjoyed speaking with such person, but "regret" that you are unable to represent them at this time. Such a short e-mail can avoid costly litigation in the event they later claim they left your office under the impression that they had retained you.

Conclusion:

Although this article is not an exhaustive list of engagement letter considerations, hopefully it has given you some ideas to implement in your practice going forward. Most of the above can be

summarized thus: when in doubt, spell it out. Should a dispute with your new client arise in the future, you will be glad you did.◆

**Originally published in AT ISSUE, Young Lawyers Division, Pennsylvania Bar Association (June 2018).*

Jonathan Skowron *is an associate in the Pittsburgh office of Schnader Harrison Segal & Lewis LLP. Mr. Skowron focuses his practice on complex commercial litigation (primarily professional negligence and product liability actions, as well as general contractual disputes), and he has represented clients in a wide variety of industries, including engineering firms, attorneys, financial institutions, insurance companies, healthcare providers, retailers, and industrial manufacturers. He can be contacted at jskowron@schnader.com.*

** See: www.schnader.com/jakarta*