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Protect yourself from the start with engagement letters

EVERY FILE SHOULD HAVE an engagement letter or fee contract detailing extent of representation

**J. RANDOLPH EVANS
AND SHARI L. KLEVENS**

WHEN RISK MANAGERS audit a law practice for the risk of legal malpractice, they look first at the files to see if every file contains an executed engagement/retainer letter or fee contract. This one document is one of the most reliable indicators of whether a law practice has in place systems that can effectively reduce the risks of malpractice claims in a modern-day law practice.

Simply stated, every open matter at a law firm should have either an executed engagement/retainer letter or fee contract. This includes new matters for existing clients, or additional clients for existing matters.

Indeed, effective risk management systems do not even permit the opening of a new file, the assignment of a client/matter number, or billing without an executed engagement/retainer letter or fee contract. Some legal malpractice insurers favor law practices that require, without exception, an executed engagement letter or fee contract before a file can be opened. Regardless, risk managers and legal malpractice insurers agree—every file should have an executed engagement/retainer letter or fee contract.

As a result, the question is not whether to have an executed engagement/retainer letter or fee contract. Instead, the question is what should go in this most important document. While every engagement/retainer letter or fee contract will vary depending on the facts and circumstances of the representation, there are some topics that should always be addressed. Here are five.

Identify the client

Attorneys owe ethical, professional and legal duties to their clients. Hence, one of the most important things an attorney can do is identify specifically who the client is. In most situations, this is simple enough. There is a single client in a single capacity. However, there are other representations when it is not so clear.

For example, in some situations, a single client can have multiple capacities. In the estate context, this could involve a single person who is both an executor and an heir. In the corporate context, it could mean representing both an officer and the corporation itself. Or, it could just mean representing multiple parties to a transaction. Regardless, the most important goal is to identify each client by name and capacity. (If more than one client or capacity is involved, then the lawyer should also address and resolve any potential conflicts of interests that may exist.)

To eliminate any misunderstanding (and

to take advantage of existing Georgia law regarding the effectiveness of disclaimers in the attorney-client context), this section should also include these statements:

“This firm does not represent any person or entity that has not been specifically identified as a client. No duties have been undertaken nor assumed for any person or entity that has not been specifically identified as a client.”

Identify the scope of the representation

After identifying who the attorney represents, the next most important step is to confirm exactly what the attorney has been hired to do. In the absence of some definition or limitation on the representation, it will likely be assumed that the representa-

The most important step for effective risk management is to actually have an engagement/retainer letter or fee contract. Then, have the client execute the engagement/retainer letter or fee contract and return it.

tion is a general representation for all purposes. General representations are fraught with risk. Specifically, in the absence of some limitation, a general representation can be unlimited in duration and scope.

As a result, an attorney hired to represent a client charged with a traffic citation in an accident might be expected to represent the client in all matters arising out of the citation. This includes representing the client at the hearing on the traffic citation. It might

also include advising the client about liabilities arising out of the accident, or the statute of limitations for claims the client might have based on the accident. The attorney may have obligations to advise the client to report the matter to the client's insurer, and to assist in collection of insurance proceeds for damages incurred as a result of the accident. There may be others.

For the attorney who wants to represent the client in every aspect of the incident, a general representation might be acceptable. However, for the attorney hired to handle only the traffic citation in a criminal proceeding, a general representation would be inappropriate. The key is to clearly define exactly what the attorney has been hired to do, and make clear that the attorney has not been retained for anything more.

Similar problems arise if there is no limitation on the duration of the representation. So, absent some limitation (or a file closing letter), an attorney retained to draft a will might have a continuing obligation to advise a client on changes in estate and taxation law long after the will has been executed. Or, in a real estate transaction, the attorney may have a continuing obligation to renew security filings, or take additional steps to protect the client's interest long after the closing. Indeed, the Georgia Supreme Court found such a continuing (or springing) duty long after a real estate closing.

To address this risk, the scope of representation should contain some time limitation. This could be a final resolution by settlement or judgment in the litigation context. It could be the closing in a real estate context. It could be the execution of the will in the estate context. But, there should be some limitation making clear that the representation is not indefinite in duration. This time

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▶ ON TOPIC

Protect yourself from the start with engagement letters

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component should then be backed up by an actual file closing letter when the event occurs. This means including a definitive statement confirming the termination of the representation and disclaiming any further duties for future legal services absent an additional retention.

Confirm the fee

Attorneys should always negotiate their fee with clients before the attorney-client relationship begins. In the engagement/retainer letter or fee contract, the attorney should confirm exactly what that fee is. For plaintiffs attorneys charging a contingency fee, there are specific rules that define the parameters of the fee, and what the attorney must disclose to the client. For attorneys retained by insurance companies or other third-parties, the rules require disclosures to insureds regarding who is paying for their representations. But the most important step is to confirm exactly what the fee is and how it will be billed, paid and/or collected.

Describe the process for withdrawal

While no representation starts with an expectation that it will not work out, every representation should contemplate such a possibility. It could be that a conflict arises requiring the attorney to withdraw. Or, the client could fail to pay their bills or refuse to

follow the directions of counsel.

Regardless of the reason, attorneys should outline the process by which the attorney may withdraw. This includes confirming the name and address for purposes of communicating an intent to withdraw if necessary. The most important part is an agreement by the client that this is the procedure to which the parties have agreed including notice for purposes of withdrawal.

Confirm that the representation is not assignable

As a result of a recent decision by the Georgia Court of Appeals, there is some issue now regarding whether a legal malpractice claim is assignable. The most effective way to address this risk is to expressly state that the representation is for personal services and is NOT ASSIGNABLE.

Other provisions

There are other provisions that can be added, including waivers of remote conflicts that do not impair or otherwise adversely impact the independent professional judgment of the attorney. Some attorneys also include fee dispute agreements, including an agreement to either mediate or use the Georgia Bar Association's fee arbitration procedures. Although the enforceability of these additional provisions have yet to be tested, they have proven effective in many circumstances.

The most important step for effective risk management is to actually have an engagement/retainer letter or fee contract. Then, have the client execute the engagement/retainer letter or fee contract and return it. ®

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