INSIGHT

Thoughts on Law Firm Engagement Letters

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By: Peter R. Jarvis & Nellie Q. Barnard of Holland & Knight

Lawyers are in charge of their fate to a much greater extent than they often realize. This is so because lawyers are in charge of the written word. By controlling what they do and do not put in writing, lawyers can largely, though not entirely, control their downstream risks. As this brief article outlines, this is no more true with any lawyer-generated documents than it is with fee agreements or engagement letters.

1. **CLIENT IDENTITY**

   Most of the duties that lawyers have—including, for example, competence, diligence, communication, confidentiality and the avoidance of conflicts—are owed only to clients. All too often, lawyers have learned to their detriment that individuals and entities that the lawyer never intended to accept as clients could and did subjectively and reasonably believe they were clients. Among others, this can include officers and employees of entity clients as well as parent companies, subsidiaries, and affiliates of entity clients. The results include claims for malpractice or breach of fiduciary duty, fee disgorgement actions, motions to disqualify, and disciplinary proceedings.

   The first step in avoiding unintended clients is to declare who is and who is not a client at the outset. Although it is always necessary to monitor the "who is the client" question as events unfold, there is no better place to start than at the beginning. Most simply put, it is very difficult for someone who is expressly declared to be a non-client to prevail in an argument that they were a client.

   There are times when, as a condition of representing part of an entity with many related companies, a law firm may need to agree to treat all related entities as clients. That is a business judgment that a firm can and should make on a case-by-case basis. Absent such a need, however, the default option should be set on the basis that, when it comes to the number of clients in a matter, less is generally better.

2. **SCOPE OF REPRESENTATION**

   Once upon a time, it was common for lawyers to use engagement letters that thanked a client for hiring the lawyer to handle the client's "matters" with no further specification. Although this may be OK in a particular situation, this kind of approach raises unnecessary risks that are better avoided for the benefit of both the lawyer and the client.

   It is far better to specify the specific matters being undertaken at any point in time. This avoids the potential for miscommunication and missed deadlines as well as situations in which the lawyer may do work that the client never wanted done and won't pay for. It is also far better to specify any exclusions from or limitations on a matter that is being undertaken. For example: Will the "papering" of a transaction cover tax advice or not? In a sale of business situation, how much due diligence can or should be done and by whom? In a litigation situation, are there kinds of claims, categories of parties or lines of discovery that are to be considered out of bounds? Absent a clear statement on each such issue—at the outset and as a matter unfolds—the risk is that in any subsequent dispute, the lawyer will have a difficult time denying responsibility. As one of our clients likes to say, "If it isn't written down, it didn't happen."

Some firms specify that any work outside of what is expressly specified in an engagement letter must be separately documented in writing. Others state that the present agreement will also govern any future work unless and until revised in writing by mutual agreement. Either approach is fine, but it is still clearly preferable to document an agreement on the tasks that the lawyer has agreed to undertake at the point that they are undertaken. And if the scope of work changes over time, this can and should be reflected in subsequent mail or email correspondence.

3. **FEES AND EXPENSES**

A full treatment of legal fee and expense issues is beyond the scope of any one article. What can be said, though, is that any ambiguity or omission on this subject is almost certain to be construed against the lawyer. In addition, many states have provisions that may or may not be found in their Rules of Professional Conduct that address issues including but not limited to limits on the percentage amounts and contract terms of contingent fee agreements, the sharing of fees between lawyers at different firms, and the use of flat or fixed fees which are to be paid in advance. The necessary requirements as well as any necessary "magic words" can vary from state to state.

With respect to hourly fees, some lawyers like to state that the hourly rate will be determined on the basis of a broad range of factors including but not limited to the result achieved for the client. Presumably, this language is included in order to allow lawyers to claim a higher rate when a matter goes particularly well. What they forget, however, is that the use of such language means that the client is entitled to argue for a lower rate when a matter goes poorly. For these reasons, we tend to prefer a simple statement of hourly rates without reference to external factors. Of course, the lawyer should also state that rates are subject to periodic change.

In all matters for which a lawyer expects a client to be ultimately liable for third-party costs or expenses, the lawyer should also consider expressly reserving the right to require that the client pay those costs directly rather than simply the right to request that the client do so.

Finally, lawyers sometimes get themselves into trouble when amending fee agreements—even if it is the client that requests the amendment. Lawyers should be aware that amendments to fee agreements often if not always raise fiduciary and fairness issues that are not at stake when an initial fee agreement is drafted.

4. **REQUESTING ADVANCE DEPOSITS**

For hourly matters, we are strong believers that if a lawyer is not going to require an advance deposit, the lawyer should at least reserve the right to require one if the client falls behind in payment or if the scope of work increases.

Relatedly, lawyers in litigation may wish to require "trial-size" advance deposits at, say, 60 or 90 days before trial is set to begin.

5. **CONFLICT OF INTEREST WAIVERS**

There is nothing inherently wrong with including a short blanket-type waiver provision in engagement letters. If and to the extent that a lawyer may want or need to rely upon such language when the chips are down, however, the lawyer should carefully consider whether this will be adequate or whether far more specific language should be included. This is particularly important since new California RPC 1.0.1(e) and (e-1) expressly requires that conflicts waivers not only be in writing, but also that they include an explanation of "the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct."

Clients have sometimes told us that they do not wish to reference a particular risk or concern in a conflicts waiver letter because the client may then refuse to consent. In such situations, our response is that this is the definition of materiality and of what should be included. If a client is going to be scared off by what a lawyer is thinking about putting in a conflict waiver letter, it is better for the lawyer to know that up front.

Of course, before relying on any form of conflicts waiver, the lawyer should be satisfied that the conflict is one that can be waived and that the likelihood of the lawyer having to withdraw mid-matter to the detriment of one or more clients is not unduly high.

6. MATTER/FILE CLOSINGS AND OBLIGATIONS

Many if not most lawyers employ language that specifies the number of years after which the firm will or may destroy documents unless the client makes different arrangements in writing. File storage costs being what they are, this saves time and confusion at a later date. Although there are some kinds of files that must effectively be kept in perpetuity, this is the better approach for files that can be destroyed.

One trap that firms sometimes fall into is having a client for whom the firm may have done one or more matters over a period of years later assert that it still is a current client rather than a former client for disqualification or legal malpractice purposes. One way to help reduce this risk is to say in an engagement letter that the attorney-client relationship will end when the work on the matter has been completed. Another way to help reduce this risk is to routinely send end of engagement letters or emails. Though remembering to send such correspondence can be challenging, it is nonetheless a helpful risk management tool and can also provide an opportunity to thank the client for the work and solicit new projects.

7. MISCELLANEOUS

a. **Client-Imposed Terms and Conditions**

Lawyers who represent large or even medium-sized entities may receive "terms and conditions" of an engagement from prospective clients. These need to be reviewed and, where necessary, objected to. Simply putting them in file drawer without reviewing them may subject the lawyer to some very unfavorable terms.

b. **No Guarantees of Fees or Outcomes**

Unless a lawyer expressly intends to do so, a guarantee of fees or outcomes is highly undesirable. So too is any statement that the firm will do the "best" or "most efficient" job possible. Although a lawyer who wants to commit to a higher standard of care is free to do so, this should not be done inadvertently or by a poor choice of words in an engagement letter.

c. **General Avoidance of Ambiguity**

Some firms keep boilerplate language in their fee agreements which is inconsistent with the express terms of particular lawyer-client agreements. Other firms do the same through attached terms and conditions. Ambiguity in these respects is not the lawyer's friend.

8. CONCLUDING REMARKS

This is only a short list of issues for consideration with respect to fee agreements. For example, we could also have addressed issues including but not limited to mandatory arbitration of fee disputes or malpractice claims, choice of venue and choice of law provisions, withdrawal provisions, and the special considerations that come into play when a lawyer can be said to be "doing business" with a client. There are also specific issues that may arise in specific areas of legal practice or with specific clients and matters. Lawyers who have not reviewed and updated their engagement letters in some time are well advised to think about doing so now or in the near future.