What Should You Agreement Inclu

The single most important document that defines the attorney-client relationship is the retainer agreement or engagement letter. Regardless of the type of matter, the value of the deal or anticipated award, having a written engagement agreement or retainer letter is a smart move, even if it is not required.

A written engagement agreement can protect both lawyer and client. It makes the relationship clear to the client, helps the client to value and take the lawyer's work seriously, and it memorializes the agreement and the scope of work to be performed in the event that any dispute should arise later.

In New York, 22 N.Y.C.R.R. 1215 governs written engagement agreements. It provides as follows:

1215.1 Requirements.

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impractible; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

1215.2 Exceptions.

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

There are also several rules in the New York Rules of Professional Conduct that apply to attorneys' engagement agreements.

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WHAT TO INCLUDE IN YOUR ENGAGEMENT LETTER

In addition to what is mandated by the rules, there are additional subjects that may be prudent for lawyers to include in their written engagement letter or agreement with the client. While you may prefer to cover some of these items in an accompanying letter or other document, rather than in the engagement agreement itself, the following areas should be covered with the client both at the initial consultation and in written form.

Who is the client?

The engagement letter should clearly state who is being represented pursuant to the agreement, and in some cases, should also indicate who is *not* being represented. For example, you may represent a specific employee but not the business itself (and vice versa). Or you may represent one member of a family, or an estate but not the individual heirs. In those cases, it may be best to specifically state whom you *do not* represent. This will highlight the fact that the client's interests may not be aligned with those of other interested parties who may also interact with you, and provide an opportunity to discuss how conflicts will be handled if they do arise.

New York Rule of Professional Conduct 1.13, Organization as Client, provides,

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

In some cases, the client may not be the one paying the bill for the representation. This could occur, for example, where you represent a child but the parent is paying the bill. In that case, the engagement agreement should set

forth the rules of confidentiality, to whom the duty of confidentiality is owed, and explain attorney-client privilege.

Scope of work and exclusions

The retainer agreement should accurately and specifically reflect the work that will be performed for the client. While this sounds simple, without a clear statement of scope, you could create confusion or discord with clients who expect that you will perform work you did not anticipate, or who did not understand that you would be billing the client for specific tasks. For example, a retainer agreement for a real estate closing may seem straightforward, but what happens if the first deal falls through?

If you are billing by the hour or under any method by which the fee will not be known until the work is completed, provide the client with an estimate or budget.

How many contracts are you willing to negotiate for the quoted fee? Be as specific as possible.

If the client does request additional services not covered under the original engagement agreement's scope of work, be sure to document both the additional services and the fee and obtain the client's consent. Be aware that the court may apply greater scrutiny to revised or amended agreements once the confidential relationship has been established.

In addition to covering work included in the representation, it may be advisable to enumerate what is *not* included in the representation. For example, if the agreement covers a litigation matter, does it include working on an appeal, or is that excluded?

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer, section (c), provides, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

Fees and costs

The agreement should include the method of calculating the fee, responsibility for expenses, frequency of bills and timing and method of payment. The clients should be advised about not only when they should expect to receive the bill, but when they are expected to make a payment. Some things to consider for this portion of your engagement agreement include:

- If an up-front retainer is paid, when will your fees be considered earned?
- Does your agreement include nonrefundable fees?
- Will the client be billed in stages?
- Is this a replenishing or evergreen retainer?
- What is the fee structure?
- Will you be seeking additional payments in advance (for example, 30 days before trial)?
- How will you accept payments (credit cards, check only, electronic payments, etc.), and what are the terms and conditions of using these payment methods?
- Are there consequences for the client's late payment or failure to pay? Will work stop until the account is current? Will the client be charged interest?
- What kinds of costs will be incurred (filing fees, expert witness fees, court reporter's bills, etc.) and when will the client be expected to pay these costs?
- Will the client pay costs directly or will the law firm pay them and seek reimbursement from the client?

If you are billing by the hour or under any method by which the fee will not be known until the work is completed, provide the client with an estimate or budget.

If your fee is subject to change, outline the circumstances under which the fee might change, and whether your quoted fee applies to the entire engagement. If you request a modification of your fee and a dispute arises later, you may be required to show that any modification of the existing fee agreement was reasonable under the circumstances at the time of the modification and that it was explained to and accepted by the client.

The requirement to communicate scope of work and fees to clients can be found in Rule 1.5 of the New York Rules of Professional Conduct, which provides in part:

> (b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

The duties and responsibilities of the parties

The agreement should set forth not only the firm's obligations to the client, but also the client's obligations to you, including the client's responsibility to cooper-

ate with you, respond to requests, provide necessary documents and information in a timely manner, preserve data, and more.

You may wish to include information about which attorney or attorneys will be staffing the client's matter and/or to reserve the right to make appropriate changes in staffing the client's matter. Good practice dictates that any such changes be communicated to the client immediately and that the client does not incur additional fees as a result of a staffing change made by the firm.

This may also be the place in the agreement to discuss the client's right to their file and the firm's file retention policies and time limitations.

Arbitration and mediation

Part 137 of the Rules of the Chief Administrative Judge establishes the New York State Fee Dispute Resolution Program. This is an informal program to resolve fee disputes between attorneys and clients through arbitration and mediation.

In matters that qualify for the program as outlined in Part 137, when a client requests arbitration under the program, it is mandatory for the attorney. But in some cases, you may wish to include a clause in your engagement agreement that the client consents to resolution of fee disputes in advance pursuant to Part 137. Or you may be required to include a clause in the engagement agreement that advises the clients of their right to arbitration or mediation of fee disputes.

Grounds for withdrawal or other consequences for breach of the agreement

Rule 1.16, Declining or Terminating Representation, outlines the circumstances under which you may withdraw from representation of a client. Your engagement agreement should advise the client that you have the right to withdraw, subject to court approval where applicable, as well as the grounds and procedure for any such withdrawal.

Similarly, your agreement should inform the clients of their right to discharge you as their lawyer and the method for doing so.

A time limitation/when the agreement takes effect

When clients fail to return an engagement agreement, it can lead to problems and potential confusion about whether you are really their lawyer. To combat this, if you send the clients the engagement agreement to sign, rather than having them sign while they are in your office, you should state specifically that the provisions contained within it (including the fee) are only valid if the agreement is signed within a specific period of time, and make it clear that if the agreement (and retainer fee) are not received within that period of time, you are not obligated to represent the client. It may be prudent to follow up with a non-engagement letter once the time period has expired.

No guarantees

Finally, you may wish to reiterate in your engagement agreement that the firm cannot guarantee clients any specific outcome to their matter.