

**NEW YORK STATE BAR ASSOCIATION  
LABOR & EMPLOYMENT LAW SECTION  
FALL MEETING**

**FORGET ROMANCE: GET IT IN WRITING –  
THE ETHICS OF ENGAGEMENT LETTERS**

**“THE BEGINNING AND THE END -- SCOPE & TERMINATION”**

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**SCOPE**

- I. Why do we care about scope of representation?
  - A. **Rules of Professional Conduct 1.5(b)**
  - B. Malpractice
  - C. Conflicts
    - 1. Partial representation
    - 2. **Rule 1.2(c)** – “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances [and] the client gives informed consent. . . .”
  - D. Client relations
- II. **Rule 1.5(b)** – “A lawyer shall communicate to a client the scope of the representation. . . .”
  - A. Re: \_\_\_\_\_
    - 1. “Labor and Employment Law Services”
    - 2. “Labor and Employment Law Services Including but not Limited to \_\_\_\_\_”
    - 3. “Labor and Employment Law Services Including \_\_\_\_\_”
    - 4. OSHA investigator is insisting on entering the client’s premises to do an inspection --

- a. “Advice with regard to Workplace Safety Issues”
      - b. “Legal Advice with regard to Workplace Safety Issues”
      - c. “Legal Advice with regard to OSHA investigations”
    - 5. Name of the case
  - B. Paragraph two of the engagement letter – a narrative as to scope
    - 1. “The scope of the representation that you have asked us to undertake is the representation of ABC Corp. in *Jones v. ABC Corp. et al.*”
    - 2. “The scope of the representation that you have asked us to undertake is advice and counsel with regard to all employment-related matters that may arise during the term of the retainer.”
    - 3. Handbook drafting or review as an example –
      - a. “The scope of the representation that you have asked us to undertake is advice and counsel with regard to the preparation of an employee handbook.”
      - b. “The scope of the representation that you have asked us to undertake is advice and counsel with regard to the preparation of an employee handbook that will comply with the laws of \_\_\_\_\_.”
- III. “A lawyer shall communicate to a client the scope of the representation . . . before or within a reasonable time after commencement of the representation. . . .”
- A. OSHA investigator at the door
  - B. Complaint filed in federal district court
  - C. Execution delays – order to show cause as an analogy
- IV. “We may –
- A. exercise our professional judgment to waive or fail to assert a right or position of yours when doing so does not prejudice your rights” – **Rule 1.2(e)**
  - B. accede to reasonable requests of opposing counsel when doing so does not prejudice your rights” – **Rule 1.2(e)**
  - C. treat opposing counsel with courtesy and consideration” – **Rule 1.2(g)**

- D. refuse to aid or participate in conduct that we believe to be unlawful, even if there is some support for an argument that it is legal” – **Rule 1.2(f)**
- V. “A lawyer shall communicate to a client the scope of the representation . . . in writing where required by statute or court rule.” – **Rule 1.5(b)**
  - A. Required –
    - 1. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1215.1-1215.2 (2011)
    - 2. N.Y. Comp. Codes R. & Regs. tit. 22, §§ 137.0-137.12 (2011)
    - 3. N.Y. Comp Codes R. & Regs. tit. 22, § 1400.3 (2011) (matrimonial)
    - 4. N.Y. Comp. Codes R. & Regs. tit. 22, § 603.7 (2011) (contingency – 1<sup>st</sup> Dep’t)
    - 5. N.Y. Judiciary Law § 488(2)(c) (2011) (expenses in contingency cases)
    - 6. N.Y. Judiciary Law § 474-a (2011) (medical, dental podiatric malpractice)
    - 7. N.Y. Judiciary Law § 475 (2011) (liens)
  - B. Management-side labor and employment law – generally not required  
Best practice – doing it in writing is not a close call
- VI. “Any changes in the scope of the representation . . . shall also be communicated to the client.”
  - A. Examples of triggers –
    - 1. Changes in the law
    - 2. Client wants additional services
    - 3. Scope exceeds expectations
  - B. “The scope of our representation may expand from the work described above (a) as specifically agreed in writing or (b) to the extent of work actually rendered and billed.”
  - C. “The scope of our representation may expand from the work described above as specifically agreed in writing.”

- D. “Only \_\_\_\_\_ has the authority to expand the scope of the work described herein.”
- E. “All questions or concerns regarding the scope of the representation should be directed to \_\_\_\_\_, and only \_\_\_\_\_ has the authority to change the scope of the representation as described herein.”
- F. Practice vs. language – tempting to let anyone start the meter

VII. Matter-by-matter scope changes?

“This provision [**Rule 1.5(b)**] 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.”

VIII. Who’s going to do the work?

- A. “Various attorneys within the Firm may participate in representing your interests. In addition, the Firm may utilize the services provided by our paralegal staff.”
- B. “I will be the partner responsible for all of your matters. I will seek assistance, when appropriate, from \_\_\_\_\_ and \_\_\_\_\_, whose current hourly rates are \$\_\_\_\_\_ and \$\_\_\_\_\_, respectively.”

IX. What is outside the scope and how detailed do you need to be?

- A. **Rule 1.5(d)(4)** – “A lawyer shall not enter into an arrangement for . . . a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated.”
- B. **Rule 1.2(c)** – “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances [and] the client gives informed consent. . . .”
  - 1. What is a reasonable limitation of the scope of services “under the circumstances”?
  - 2. Is an engagement letter alone sufficient for getting the required informed consent to a limitation?
- C. Guarantees – “No law firm or attorneys, including our Firm and our attorneys, can guarantee the outcome of any legal dispute. Thus, although an attorney or attorneys of our Firm may offer an opinion about possible

results regarding any matter in which we represent or advise, we do not and cannot guarantee any particular result.”

- D. Insurance – “Any or all of the claims made in this matter may be covered by insurance. Because such matters are outside the scope of our representation, specific questions of insurance coverage should be directed to your insurance professional or other counsel. We recommend that you do so promptly in this matter and in any other matter in which we may represent you in the future. Insurance coverage and payment issues are expressly the responsibility of the client, unless otherwise specifically agreed to by the Firm in writing. At your instruction, we will cooperate with your insurance carrier and insurance professionals by providing information regarding your claim and copies of your billings, but insurance companies, rightfully or wrongfully, sometimes dispute the issue of coverage and the amount, if any, they are willing to pay their insureds’ independently retained counsel. In addition, insurance carriers sometimes impose delays before payment or apply different billing standards and methods than used by our Firm. Accordingly, we will bill our fees and costs directly to you, and payment will be due from you on a current basis, whether or not your carrier eventually reimburses you. An insurance company’s determination of what it will pay for our services, whether greater or lesser than actually billed, is a matter of contract between the insurance company and its insured and does not affect the amount due to our Firm.”
- E. Identification of who the client is not?
1. “We do not represent the following affiliates. . . .”
  2. “We do not represent the following individuals. . . .”
    - a. At all
    - b. In this action
  3. If services are nonetheless provided to an affiliate, what governs? The practical problems triggered by the desire to start the running of the meter.
  4. Letters to those that are not going to be represented in the matter; *e.g.* closely held corporation, or multiple complainants, or multiple class representatives?
- F. We will not –
1. engage in illegal or fraudulent conduct – **Rule 1.2(d)**

2. advance or guarantee financial assistance (listing the exceptions) – **Rule 1.8(e)**

G. We have not –

1. solicited any gift – **Rule 1.8(c)(1)**
2. required or demanded sexual relations as a condition of entering into this agreement – **Rule 1.8(j)**
3. Is there such a thing as an engagement agreement that is too long?

H. You cannot –

**Rule 1.8(h)** – “A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice. . . .”

X. RFP’s and non-engagement letters

- A. To those who interviewed you
- B. Those to which you responded
- C. Nothing confidential discussed – OR – confidences shared during the RFP process will not be shared by the lawyers from our firm involved in the RFP process with any other lawyers at the firm.

## **TERMINATION**

- I. Anticipation and grounds –
  - A. “We expect from our clients the highest degree of cooperation and assistance. You agree to fully respond to any inquiries we make, provide written materials or documents in a timely manner, and otherwise provide us with any and all information necessary for your defense. Failure to provide such information could prejudice your case and ultimately reduce the effectiveness of our representation.”
  - B. “In order to assist us in avoiding conflicts of interest among our clients, we ask that you submit to us a list of all subsidiary or affiliated entities and your parent company, as well as a list of the shareholders of closely held corporations, if applicable, principal officers and board members, and any other entity involved in your matter that you have reason to believe has, or has had, a relationship with the Firm. Please update this information as changes occur.”
  - C. “We can withdraw for any reason or no reason.”?
    - 1. Not advisable because not true
  - D. Examples of reasons –
    - 1. Non-payment of fees or costs
    - 2. Misrepresentation of or failure to disclose material facts
    - 3. Failure to cooperate
    - 4. Actions contrary to our advice
    - 5. Conflict of interest
  - E. “We will try to give advance notice when we make the decision to terminate our representation.”
- II. Fee responsibility upon termination – “If more than one entity or person has signed this Engagement Agreement, then each is jointly and severally responsible for all fees and costs accruing hereunder, notwithstanding the fact that the clients may agree to apportionment among themselves or that the Firm may bill or accept payment in accordance with such an apportionment agreement.”

### III. Mechanics –

- A. “We do not foresee any circumstance that would lead to termination of our attorney-client relationship, other than completion of all anticipated tasks on your behalf. However, the law allows a client the right to terminate the representation of an attorney or law firm at any time. Subject to our giving you reasonable notice for you to arrange alternative counsel, our Firm reserves the right to discontinue work on pending matters or terminate our attorney-client relationship at any time that a statement remains due and unpaid 60 days after it has been sent, at any time when we feel our relationship with you puts us in violation of the Bar’s ethical principles and standards or the applicable Rules of Professional Conduct, or at any time termination of the relationship is required or permitted by law.”
- B. “The circumstances under which the Firm may withdraw from representing Client include, but are not limited to, the following:
  - Where insufficient legal grounds exist to continue a court action or other action;
  - Where the Client fails to cooperate with the reasonable requests of Pro Bono Counsel;
  - Where the Client’s income changes, and the client is no longer financially eligible for representation by the Firm;
  - Where the Client requires legal action against the insurance company to settle its claim; or
  - If and when a conflict arises with another client of the Firm.”
- C. “We appreciate the opportunity to serve as your attorneys. However, in the event you become dissatisfied with any aspect of our relationship including, for example, the quality or adequacy of our representation or the fees charged, we encourage you to bring such concerns to our attention immediately. It is our belief that most problems can be resolved by good faith discussion between us. Nevertheless, it is always possible that a dispute may arise which cannot be resolved by discussion between us. If a dispute exists between us regarding attorneys’ fees and/or costs, you and the Firm agree that the dispute will be submitted as required or otherwise permitted under state law.”
- D. “Our representation should be deemed as terminated your your receipt of an invoice from us described as ‘final.’”

IV. Files and documents –

- A. ABCNY Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-1 (2010)  
– you can agree in advance what will be returned, kept by lawyer,  
discarded by lawyer when representation is over.
- B. “All files and/or documents retained at the Firm relating to your  
representation are and remain your property, as the client, except for the  
Firm’s internal and/or administrative documents, such as attorney time  
sheets.”
- C. “You may have access to these materials at any time, and upon  
termination of our representation, you may withdraw these materials with  
prior written notice. The Firm reserves the right to photocopy the Client’s  
files at the client’s expense.”
- D. “We reserve the right to destroy all files ten years after the cessation of  
representation in a matter unless you request their return.”
- E. “In the event you choose to change representation to any attorney outside  
this Firm, a written notice authorizing the transfer of your files must be  
submitted. We reserve the right to retain photocopies of any of these  
documents.”

V. Continuing obligations

- A. You need to be aware of the following impending deadlines
- B. We encourage you to look for other counsel
- C. We encourage you to seek new counsel immediately because \_\_\_\_\_
- D. Cooperation
  - 1. We will cooperate with your new counsel
  - 2. For nothing?

VI. Written notice that the representation is over?

- A. Option 1 – “We have completed and are closing our file.”
- B. Option 2 – “Please be advised that we don’t represent you anymore.”

- C. Option 3 --
  - 1. We think we're done
  - 2. We won't be monitoring changes in law, etc.
  - 3. Is there anything else you're looking for from us?
  - 4. We'd like to be retained for additional matters
- VII. End-of-matter letters to larger clients with other ongoing matters?

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