PROGRAM MATERIALS
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Retainer Agreements: Ethics and Practical Advice for all Attorneys

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Retainer Agreements

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Presenter Background

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Disclaimers

- The views expressed are solely those of the presenter, and should not be attributed to the presenter’s firm or its clients.

- This presentation does not constitute legal advice; nor does it constitute solicitation of an attorney/client relationship.

Topics Covered

- Why retainer agreements?
- Who is the client?
- What is the scope of representation?
- What is the fee arrangement?
- What about conflicts of interest?
- What about “risky” provisions?
- Practice tips.

Why Retainer Agreements?

Agreements May Be Required By Law

New York (example): Title 22 Part 1215 of the Official Compilations of Codes, mandates that attorneys provide their clients with engagement letters: “before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation.”

Improve Communication/Minimize Risk

- Focus client (and lawyer) on who is (is not) being represented, what the scope of representation will be, fee arrangements, and other matters
- Notice to / waiver by client may avoid conflict claims
- Business-like form reinforces nature of the professional relationship

No Attorney-Client Relationship Without Agreement

- ABA Model Rule 1.18 (duties to prospective client).
- Rule 1.18 [n.5]: Attorney may condition conversation with prospective client on person's informed consent that no information disclosed during consultation will prohibit lawyer from representing another client.
- "No relationship without a written agreement" reinforces the distinction.

Who is the Client?

Importance of Defining the Client

- Conflict checks
- Control of attorney/client privilege
- “Corporate Miranda warnings” in investigations
- Obligations to report wrongdoing (e.g., Sarbanes-Oxley).
- See Model Rules 1.6 (Confidentiality of Information) and 1.13 (Organization as Client)
- Payment does not (necessarily) mean client status

Trap For The Unwary

- Stumbling into attorney/client relationship
- Vagueness as to obligations. Restatement (Third) Law Governing Lawyers Sec. 14: relationship is formed when a person manifests an intent that a lawyer provide legal services, and the lawyer either (a) manifests consent or (b) <u>fails to manifest lack of consent</u> and knows or reasonably should know the person reasonably relied on the lawyer to provide the services.
- Duty violations may constitute malpractice.

What is the Scope of Representation?

Why Scope Matters

- Model Rule 1.2 (scope of representation): duty to consult with client and abide by client's directions
- Model Rule 1.7 (conflict of interest)
- Example: "Local counsel" role
- Example: Subsequent / related proceedings (e.g., appeals)
- Example: DUI proceeding, but not license suspension or civil matters

ABA Ethics Op. 472 (2015)

- Model Rule 1.2(c): "a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."
- Thus, "when lawyers provide limited-scope representation to a client, they [should] confirm with the client the scope of the representation—including the tasks the lawyer will perform and not perform—in writing that the client can read, understand and refer to later."
- Review any applicable state rules.

Responsibility For Supervision

- In re Dickens, 174 A.3d 283 (D.C. Ct. App. 2017):
- Lawyer previously represented client for divorce matter; referred trusts and estates matter to a separate lawyer in the firm
- Lawyer not formally engaged to assist with the trusts and estates matter, BUT lawyer assured client she would “talk to” client if necessary
- Lawyer failure to discover misuse of funds by principal lawyer is basis for disciplinary action

What is the Fee Arrangement?

Model Rules 1.5 (Fees)

- “[T]he rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.”
- “Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”

ABA Ethics Opinion 93-379 (1993) (Billing)

- Overhead: lawyer's "cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like" is "subsumed within the charges the lawyer is making for professional services."
- Costs: No surcharge or mark-up to client unless increase bears a reasonable relationship to the actual cost of providing such services.
- Discounts: If lawyer gets a discount by virtue of being a steady customer of a service provider, the discount should be passed along to the client.

ABA Task Force on Lawyer Business Ethics, *Statement of Principles (1996)*

- "The lawyer's invoice for legal services rendered to the client should be consistent with what has been disclosed and agreed to by the client."
- "The lawyer responsible for billing should review each invoice to confirm that the invoice has been prepared in accordance with the billing arrangement reached with the client at the beginning of the engagement[.]"

Contingency Fees: Model Rule 1.5(c)

- Agreement "shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated."
- Agreement must "clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party."

Failure To Notify Client Of Fee-Sharing Arrangement

- Tarzy v. Dwyer, 2019 WL 132280 (S.D.N.Y. 2019): Settlement of contingency fee case.
- “General” oral understanding of client that one lawyer would serve as “lead” insufficient.
- Client’s after-the-fact agreement to fee-sharing does not cure invalidity of original notice.
- Lawyer’s breach of contract claim (for portion of settlement) dismissed.

Duplicate Billing Of Joint Clients

- People v. Ziankovich, 2018 WL 6061422 (Colo. Sup. Ct. Discip. Committee 2018):
- $2,8000 “consultation” fee, for two hour meeting, charged to both clients.
- Held: fee “disproportionate” to work.
- Sanction: suspension.

Failure To Follow Terms Of Engagement

- In Re Addams, 579 A.2d 190 (DC 1990): disbarment presumptively appropriate for misappropriation of client funds.
- Lawyer doing client a favor by working for her even though she was continually tardy in paying.
- Lawyer took money out of escrow account as a means to pay for services client had not yet paid for directly.

What About Conflicts Of Interest?

Model Rule 1.7 (Concurrent Conflict)

Lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule 1.7 (Exception)

Lawyer may represent a client if: (1) lawyer reasonably believes that lawyer will be able to provide competent and diligent representation to each affected client; (2) representation is not prohibited by law; (3) representation does not involve assertion of a claim by one client against another client represented by the lawyer in the same litigation; and (4) each affected client gives informed consent, confirmed in writing.

Model Rule 1.8(a) (Business Transaction With Client)

Lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, except: (1) transaction and terms are fair and reasonable to client and fully disclosed in writing in a manner reasonably understood by client; (2) client advised in writing and given reasonable opportunity to seek advice of independent legal counsel; and (3) client gives informed consent, in writing.

Mere Potential For Adversity Insufficient To Establish Conflict

Konopka v. Duba, 2018 Ill. App. 163150-U (Ill. App. 2018)

- Joint representation of borrower and guarantor in claim by lender not subject to “directly adverse” conflict, where both parties “on the same side” in loan collection matter
- Mere payment of fees (for joint representation) by one party did not create adversity

Current Conflict, Versus Conflict From Former Representation

Tufamerica, Inc. v. Codigo Music LLC, 2013 WL 1903867 (S.D.N.Y. May 7, 2013).

- Court distinguished between "concurrent representation" (of both one client and another client adverse to that client) and "successive representation" (of a new client adverse to a former client).
- "Concurrent representation" is "prima facie improper, unless the attorney is prepared to show there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation."

Current Conflict, Versus Conflict From Former Representation

- Where "successive representation" appears, disqualification is warranted if "(1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client."
- ABA Model Rule 1.9 (duties to former clients).

No Direct Adversity

<u>Milwaukee Elec. Tool Corp. v. Hilti, Inc.</u>, 2015 WL 1898393 (E.D. Wis. Apr. 27, 2015)

- No direct adversity where current client of plaintiff's law firm intervened in patent infringement action involving other defendants
- Since plaintiff's products were not at issue in the case, and law firm did not perform any work for client on those patents
- "Mere possibility" of overlapping issues insufficient

"Substantial Relationship" Test

In re Datatreasury Corp., 2010 WL 3074395 (Fed. Cir. Aug. 5, 2010).

- "The test requires only that the attorney could have received confidential information during the first representation that would be relevant in the second. It is irrelevant whether confidential information is actually received."
- Even where a lawyer's work on a matter was so brief that he did not bill the client for his time, the lawyer was nevertheless disqualified.
- "To provide the public with additional trust in the attorney-client relationship, a more restrictive rule has also developed prohibiting representation of an adversary of a former client if the subject matter of the two representations is 'substantially related.'")
- ABA Model Rule 1.9(a) (duties to former clients).

Factual Overlap

Innovative Memory Solutions, Inc. v. Micron Tech., Inc., 2015 WL 2345657 (D. Del. May 15, 2015)

- Substantial relationship where prior trade secrets action showed “factual overlap” with present case
- Fact that prior case resulted in long, public trial (which arguably revealed much of the confidential information), but it is “the weaknesses in the case,” that were “kept back” that is confidential
- Court noted unseemly risk of lawyer cross-examining his own former client

Prior Joint Representation

Auto-Dimensions LLC v. Dassault Systems Solidworks Corp., 2014 WL 828617 (D. Mass. Mar. 4, 2014)

- Prior joint representation does not automatically disqualify counsel
- No current direct claims between previously joint clients
- No apparent reason for current client to seek to aid adverse party

Prior Joint Representation

Peter Kiewit Sons, Inc. v. Wall Street Equity Grp., Inc., 2013 WL 571791 (D. Neb. Feb. 13, 2013).

- Court disqualified counsel who previously represented a group of defendants, after one of the defendants became hostile to counsel, and adverse to the remaining defendants.
- After break with counsel, representation of the remaining defendants placed counsel in a position “materially adverse” to the former client.
- ABA Model Rule 1.7 cmt 29.
- Defendant group’s interests, “[b]roadly interpreted,” remained aligned, but there were “legitimate and substantial disagreements involving actual and foreseeable conflicts between the defendants.”
- Former counsel “possesses information gained in her previous representation” of the departing member of the defense group, which could be “used against him” by the other defendants.

Joint Defense Agreement

Cochran v. Five Points Temporaries, LLC, 2012 WL 4726285 (N.D. Ala. Sept. 27, 2012).

- Court held mere existence of a joint defense agreement did not create an irrebuttable presumption of sharing of confidences between a co-defendant and counsel for another defendant.
- Discussions between counsel for co-defendants, regarding tactics and strategies, without the presence of clients, did not suffice to show that confidential client information was exchanged.

Consent/Waiver Of Conflict

Failure To Obtain Waiver Before Proceeding With Joint Work

Gebman v. Comm’r of Internal Revenue, 114 TCM 346 (2017).

- Husband and wife as joint clients in action challenging IRS collection of tax deficiencies and penalties
- Wife claims “innocent spouse”
- Husband refuses to consent to waive potential conflict
- Lawyer proceeds to represent both spouses
- Held: attorney disqualified

Advance Waiver Of Conflicts

In re Shared Memory Graphics LLC, 659 F.3d 1336 (Fed. Cir. 2011).

- Court granted a petition of mandamus, vacating a trial court order disqualifying counsel.
- Court noted: advance waiver of conflicts "is not only proper but beneficial for parties[.]"
- Restatement (Third) of the Law Governing Lawyers, Sec. 122 cmt. D (2000)).
- Court also noted: "if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective."
- ABA Model Rule 1.7 cmt. 22.
- Dissent suggested waiver was ineffective, because new law firm (to which former counsel moved) had not demonstrated that it had erected "the traditional 'firewall.'"

Broad Advance Waiver Disapproved

Lennar Mare Island, LLC v. Steadfast Ins. Co., 2015 WL 1540638 (E.D. Cal. Apr. 7, 2015)

- Advance waiver too "broad, general and indefinite"
- Law firm relationship expanded over time, but no further waiver sought
- Law firm waited to revisit waiver issue, which could have avoided "misunderstanding"

Open-Ended Waiver Of Conflicts

Galderma Labs., L.P. v. Actavis Mid Atlantic LLC, 2013 WL 655053 (N.D. Tex. Feb. 21, 2013).

- Court upheld an advance conflict waiver and denied a motion for disqualification.
- Court noted: a "general and open-ended waiver will ordinarily be ineffective, because the client will likely not have understood the material risks involved."
- A general, open-ended waiver "is more likely to be effective" if the client is "an experienced user of the legal services involved," is "reasonably informed regarding the risk that a conflict may arise," and "is independently represented by other counsel in giving consent" and "the consent is limited to future conflicts unrelated to the subject of the [pending] representation."

Risky Provisions

Prohibited

- Limitation of liability. Model Rule 1.8(h) (shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement).
- Restriction (or penalties) on right to settle. Model Rule 1.2(a) (lawyer shall abide by a client's decisions concerning the objectives of representation). See NYCLA Ethics Op. 699 (1994) (agreement may not require lawyer’s consent for settlement).
- Non-refundable (unearned) fees. Model Rule 1.16(d) (upon termination, lawyer shall refund any advance payment of fee or expense that has not been earned or incurred).

Arbitration Of Malpractice Claims

- Snow v. Bernstein, Shur, Sawyer & Nelson, P.A., 176 A.3d 729 (Maine Sup. Ct. 2017):
  - Attorney must fully inform client of contractual provision requiring arbitration of malpractice claims
  - Reference to arbitration of fee disputes “not sufficiently clear” to include malpractice
- Smith v. Lindemann, 710 Fed. Appx. 101 (3rd Cir. 2017):
  - Broad reference to arbitration of “any difference, disagreement or dispute” effective, despite failure to include the word “malpractice”
  - Provision expressly stated that client’s agreement constituted “waiver” of right to have disputes resolved by a court, which “might include having the matter determined by a jury”

Generally Not A Good Idea

- Immediate termination for non-payment. Model Rule 1.16(d) (lawyer shall take steps to the extent reasonably practicable to protect client's interests, such as giving reasonable notice to client of intent to withdraw).
- Imposition of costs of collection where client fails to pay timely. See Ween v. Dow, 35 A.D.3d 58 (1st Dep’t 2006) (held “fundamentally unfair and unreasonable”).
- Unstated interest charges. See Wisc. Ethics Op. E-09-03 (if lawyer intends to charge interest on unpaid balances, that information must be part of the written communication to the client regarding fees).
- Retaining lien. Model Rule 1.16(d) (upon termination of representation, a lawyer should return the client’s file and other property) (some jurisdictions prohibit lien on files).

Additional Terms To Consider

- Methods of communication: how / when.
- Billing procedures.
- Use of support staff and vendors.

Practice Tips

Before Engagement

- Are you competent to handle the matter? Rule 1.1 (competence). If not, can you get assistance?
- Do you have time / resources to handle the matter?
- What are the client's expectations (and are they reasonable)?
- Does the client have the ability to pay for your services?

If NOT Engaged

- Clear statement (disclaimer) regarding “no attorney-client relationship.”
- Consider advisory: potential client should consult counsel to determine rights (including any applicable time limits to enforcement of rights).

After Engagement Is Concluded

- Notice of end of attorney-client relationship (with regard to the matter).
- Notice of intended disposition of client records.

Engagement Letter/Termination

Erfindergemeinschaft Uropep GbR v. Eli Lilly & Co., 2016 WL 760909 (E.D. Tex. Feb. 26, 2016):

- Express provisions of an engagement letter, regarding limits of prior engagement, sufficed to establish that the former representation was concluded, even though the law firm continued to provide the former client with marketing materials.
- Court also noted that the law firm had sent a letter, memorializing the end of the relationship (which had “terminated some time earlier”).

Questions