



# Engagement Agreements as a Legal Malpractice Avoidance Tool

By Alesia S. Sulock

**E**ngagement agreements are an essential component of providing legal services. Often, at the beginning of an engagement, the attorney focuses on the details of the matter and the steps needed to immediately advance the client's interests but neglects the necessity of defining the relationship.

A thorough engagement agreement forces the attorney to make critical decisions about the attorney-client relationship at the outset, setting up the parties for clear expectations throughout the engagement. Moreover, the Pennsylvania Rules of Professional Conduct require a written fee agreement in most cases. *See Pennsylvania Rule of Professional Conduct 1.5(b)*. The agreement is a useful tool to lay the baseline for client expectations, to reduce the risk of misunderstandings between the attorney and the client and to begin effective client communications. Later, in the unfortunate event of a malpractice claim, an engagement agreement can be a critical piece of evidence in support of the defense.



## Key Components of an Effective Engagement Agreement

An effective engagement agreement includes at least six components: (1) the identity of the client, (2) the scope of the representation, (3) details of the fee arrangement, (4) disclosure of any conflicts of interest, (5) file retention and destruction procedures and (6) the client's signature. In fact, many malpractice insurance carriers ask attorneys to provide sample engagement letters when applying for or renewing insurance and expect to see these components in an attorney's form agreement. CNA, for example, provides example engagement letters in its "lawyers tool kit." An attorney should check with her or his carrier to determine if such model letters are available.

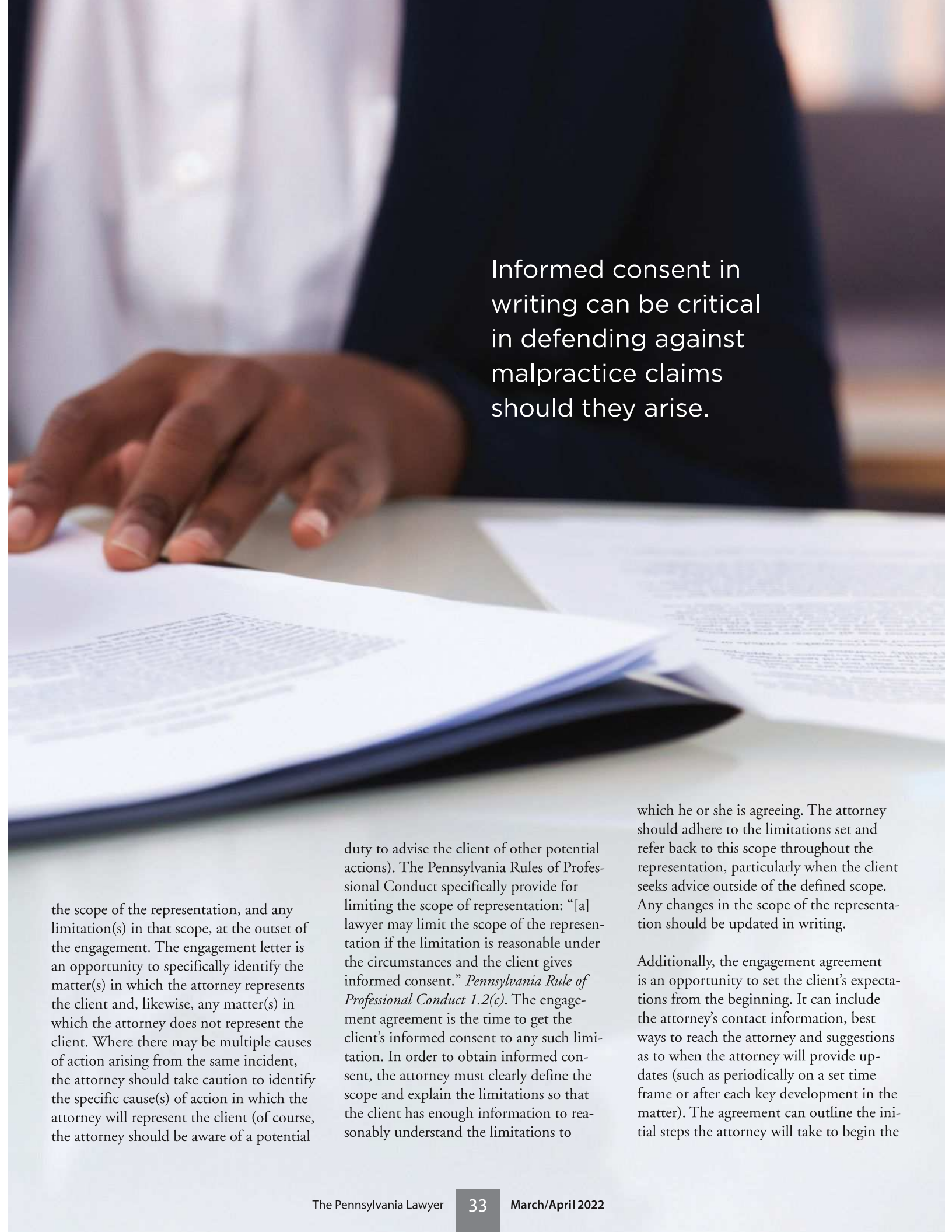
### *Identity of the Client*

First, an engagement agreement must identify the client. In some cases, the attorney is retained by an individual, and this component is so simple it nearly goes without saying. In other cases, this is the most important aspect of the agreement. The attorney must carefully consider who he or she represents and, of equal importance, who he or she does not represent. For example, an attorney may represent a corporation but not the officers and directors or an attorney may represent an individual but not his or her spouse. This analysis should be performed immediately at the time of retention and the decision adhered to throughout the representation. In complex matters, it may be appropriate to both identify the client and to explicitly state who the attorney does not represent. If the

attorney agrees later to represent more parties, additional or amended engagement agreements should be executed and new conflict analyses should be conducted. Joint representation agreements may be necessary where the attorney decides to represent more than one client in a single matter.

### *Scope of the Representation*

Second, and of equal importance, the attorney should evaluate and communicate



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the scope of the representation, and any limitation(s) in that scope, at the outset of the engagement. The engagement letter is an opportunity to specifically identify the matter(s) in which the attorney represents the client and, likewise, any matter(s) in which the attorney does not represent the client. Where there may be multiple causes of action arising from the same incident, the attorney should take caution to identify the specific cause(s) of action in which the attorney will represent the client (of course, the attorney should be aware of a potential

duty to advise the client of other potential actions). The Pennsylvania Rules of Professional Conduct specifically provide for limiting the scope of representation: “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” *Pennsylvania Rule of Professional Conduct 1.2(c)*. The engagement agreement is the time to get the client’s informed consent to any such limitation. In order to obtain informed consent, the attorney must clearly define the scope and explain the limitations so that the client has enough information to reasonably understand the limitations to

which he or she is agreeing. The attorney should adhere to the limitations set and refer back to this scope throughout the representation, particularly when the client seeks advice outside of the defined scope. Any changes in the scope of the representation should be updated in writing.

Additionally, the engagement agreement is an opportunity to set the client’s expectations from the beginning. It can include the attorney’s contact information, best ways to reach the attorney and suggestions as to when the attorney will provide updates (such as periodically on a set time frame or after each key development in the matter). The agreement can outline the initial steps the attorney will take to begin the



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representation, such as preparing an answer in litigation or reaching out to opposing counsel to begin negotiations in a transactional matter. The agreement can also identify the matters for which the client is responsible or the information the attorney needs from the client in order to successfully pursue the client's interests. Further, the attorney can use the engagement agreement to advise the client of obligations with respect to evidence preservation and to caution the client not to discuss the matter publicly or to share it on social media. Each of these topics can set the tone for the attorney-client relationship and manage the client's expectations as to what the attorney is going to handle on the client's behalf, as well as define the responsibilities of the client with respect to the representation.

#### *Fees*

Third, the fee structure for the representation should be clearly described in the engagement agreement. The Pennsylvania Rules of Professional Conduct provide that “[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.” *Pennsylvania Rule of Professional Conduct 1.5(b)*. In many cases, this places the obligation on the attorney to at least address her or his fees in a written agreement with the client. Further, contingent fees must be communicated and agreed to in writing: “A contingent fee agreement shall be in writing 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.” *Pennsylvania Rule of Professional Conduct 1.5(c)*. Explaining the fee structure in writing at the outset of the engagement not only ensures that the attorney has complied with his or her ethical obligations with respect to such matters, but it also solicits the client's agreement to

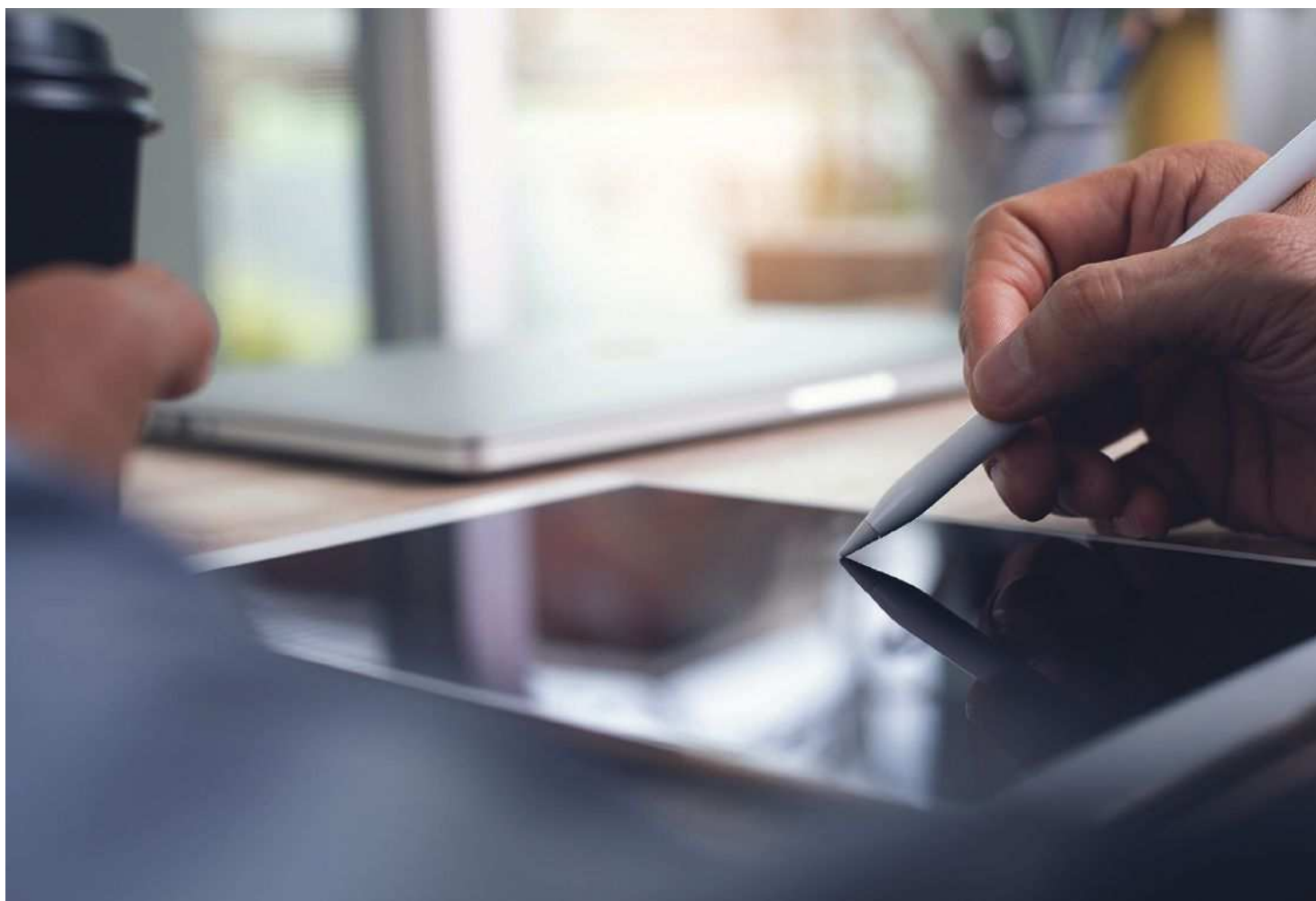
pay, which can aid in later collection of fees owed. In fact, the engagement agreement can provide for a retainer to be provided by the client, which must be reimbursed when depleted, further reducing later fee disputes in many cases.

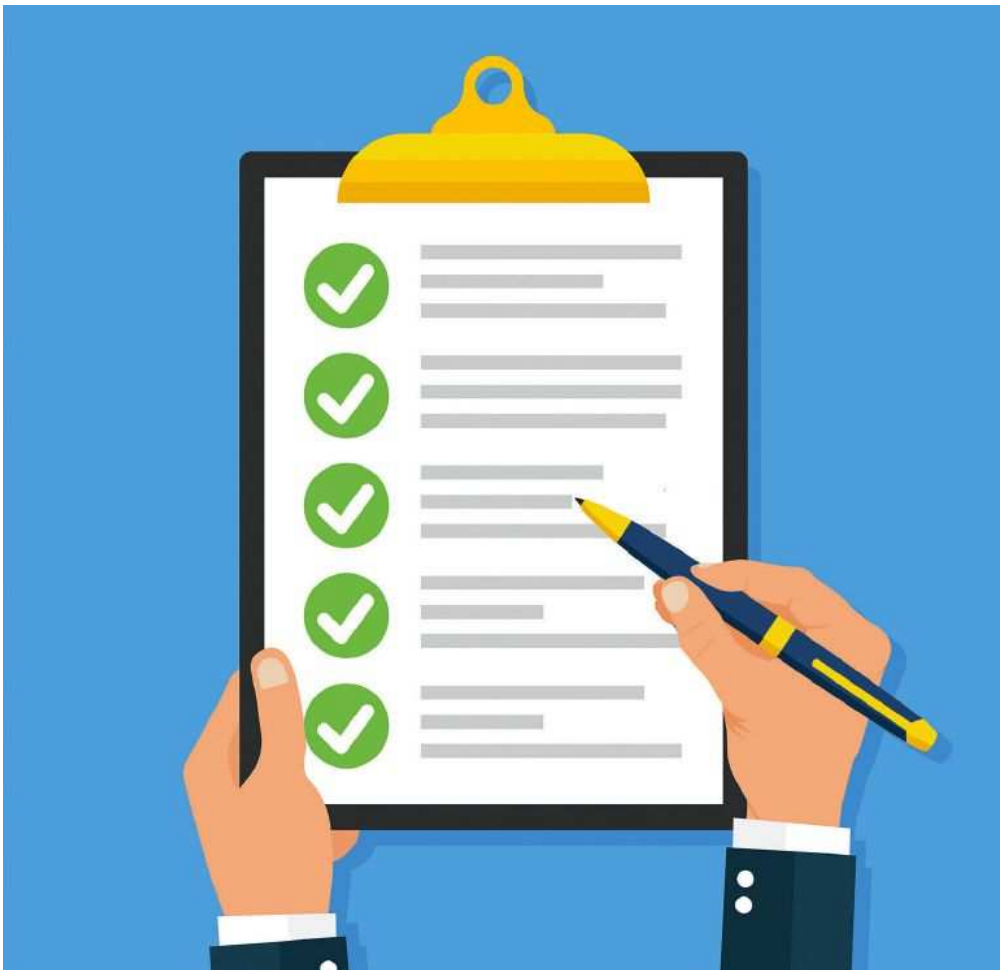
### *Conflicts of Interest*

Fourth, known actual or potential conflicts of interest should be addressed in the engagement agreement. An attorney must, before accepting an engagement, perform a conflict check to ensure there are no non-waivable conflicts preventing the attorney from representing the prospective client. When this analysis reveals the presence of a waivable conflict of interest, the engagement agreement is the time to disclose the conflict or potential conflict and to obtain

informed consent. The Pennsylvania Rules of Professional Conduct provide that 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.” *Pennsylvania Rule of Professional Conduct 1.7(a)*. An attorney may engage in a concurrent conflict of interest if: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the

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lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent.” *Pennsylvania Rule of Professional Conduct 1.7(b)*. “Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” *Pennsylvania Rule of Professional Conduct 1.7(b), Comment 18*.

Conversations with prospective clients regarding conflicts or potential conflicts may often occur in person or over the phone. The Rules of Professional Conduct do not require that informed consent be given in writing, but “a writing tends to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.” *Pennsylvania Rule of Professional Conduct 1.7(b), Comment 20*. Thus, it is a best practice to obtain conflict waivers in writing. If the conflict or potential

conflict is known at the outset of the engagement, the conflict can be disclosed and the informed consent obtained in the engagement agreement.

The engagement agreement is also the appropriate place to address issues surrounding joint representation. When an attorney agrees to represent more than one client in the same matter, there is often an inherent risk of a conflict arising down the line if the interests of the clients become no longer aligned. Attorneys should use the engagement agreement as an opportunity to address the joint representation, explaining the risks and benefits thereof, and obtaining all clients’ informed consent to the arrangement.

When conflicts of interest or joint representations are at issue, the engagement agreement can (and probably should) also recommend that the client seek independent counsel before waiving the conflict or signing the agreement. Such language can assist in further supporting that the client



provided informed consent to the arrangement. Informed consent in writing can be critical in defending against malpractice claims should they arise.

#### *File Retention and Destruction Procedures*

Fifth, attorneys should implement file retention and destruction procedures and, importantly, communicate them to their clients. By including this information in the engagement agreement, the attorney ensures the client understands at the outset what will happen to the file, both during and after the representation. This provides the client with the necessary information to decide what steps to take to preserve materials from the file if the client wishes to retain anything after the representation concludes.

#### *Client Signature*

The engagement agreement is, of course, a contract between the attorney and the

client. To be effective, the attorney must ensure the client actually signs the agreement. Often, the engagement agreement is sent at the outset of the representation, but there is no follow-up in order to ensure the client has signed. It is critical to obtain a signed copy of the engagement agreement to ensure the client received the information and agreed to the terms.

#### **Limitations of the Engagement Agreement**

Just as there are certain topics a good engagement agreement should address, there are certain things an engagement agreement should not do. First, an attorney should not guarantee an outcome in the engagement agreement. In fact, the engagement agreement is an appropriate place for the attorney to advise the client that the outcome is not guaranteed, and giving such advice at the outset is an excellent practice to manage client expectations. Such language can help to protect against future claims of unfulfilled promises.

In many cases, it is advisable for the attorney to communicate in writing that he or she is declining to represent the client in the form of a nonengagement letter.



Second, the attorney cannot typically request that a client waive potential, future malpractice claims via the engagement agreement. Pennsylvania Rule of Professional Conduct 1.8(h), Comment 14, provides: “[a] lawyer shall not (1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement” because such agreements are “likely to undermine competent and diligent representation.”

Third, attorneys must be careful not to violate any of the Rules of Professional Conduct in preparing engagement agreements. *Pennsylvania Rule of Professional Conduct 1.2, Comment 8* (“[a]ll agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8, and 5.6”).

## Disengagement Letters

In addition to engagement agreements, attorneys should endeavor to send clients disengagement letters at the conclusion of a representation. With respect to a contingent fee arrangement, the attorney is required to provide the client with “a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of

its determination.” *Pennsylvania Rule of Professional Conduct 1.5(c)*. This can be accomplished within a disengagement letter marking the conclusion of the matter and, therefore, the representation. Even if there is no contingent fee arrangement, disengagement letters are a useful tool to further support the limited scope of the engagement explained in the initial agreement and to remind the client of the file retention and destruction policies. It is certainly more difficult for the client to claim he or she continued to rely on the attorney’s services after a disengagement letter has been provided.

## Nonengagement Letters

Sometimes an attorney receives an inquiry from a prospective client or even meets with a prospective client before deciding not to accept the engagement for one reason or another. In many cases, it is advisable for the attorney to communicate in writing that he or she is declining to represent the client in the form of a nonengagement letter. The letter should clearly state that the attorney will not be representing the prospective client. The letter should further advise the prospective client to consult with another attorney if legal services are still required. To the extent applicable, the letter should caution the prospective client to be aware of relevant statutes of

limitations and other time limitations in pursuing the matter; however, it is not necessary and, in fact, often not advisable for the attorney to advise the prospective client of the specific time limitations at issue. Having declined the representation, the attorney may not be aware of all of the facts necessary to make a complete analysis of the relevant time limitations and should not provide incomplete legal advice to a nonclient.

A thorough engagement agreement is an excellent tool to set client expectations and define the terms of the relationship. It becomes even more important in the event the matter does not proceed as expected and disputes between the attorney and the client arise. ☞



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