

Letters of Engagement Are Now Mandatory

BY ROY SIMON

Effective March 4, 2002, pursuant to a new 22 NYCRR Part 1215 entitled "Written Letter of Engagement," every New York lawyer must begin providing every client with a written letter of engagement in every matter that does not fall within an exception. This article discusses the new rule's requirements and exceptions. [*Editor's note:* See sample letter of engagement, this issue, pg. 9. See full text of new Part 1215, pg. 10.]

Overview

Part 1215 consists of two sections. Section 1215.1, entitled "Requirements," contains three subdivisions. Subdivision (a) mandates the use of engagement letters in all fee-paying matters that are not exempted, and tells when the lawyer must provide the engagement letter to the client. Subdivision (b) says that the engagement letter must describe the scope of the legal services to be rendered, and the lawyer's fees, expenses, and billing practices. Subdivision (c) exempts all matters covered by a signed written retainer agreement. Section 1215.2 exempts three categories of matters: (1) matters in which the legal fees are expected to be under \$3,000; (2) matters of the "same general kind" in which the client has paid the attorney's fees; and (3) domestic relations matters.

In 1995, the Craco Committee recommended that the State Bar adopt a new Disciplinary Rule requiring a lawyer to give every *individual* client a letter of engagement "upon the commencement of the representation" whenever the fee to be charged was "expected to be \$1,000 or more." The main purpose of the proposed rule was to ensure a meeting of the minds between lawyers and clients and to avoid fee disputes that eroded public confidence in the legal profession.

The State Bar appointed a special committee to review the Craco Committee's recommendations. The review committee generally supported the Craco Committee's engagement letter proposal, but suggested requiring engagement letters for corporate clients and raising the fee threshold to \$5,000.

In January of 2001, the NYSBA Special Committee on Public Trust and Confidence in the Legal System recommended mandatory retainer agreements for *all* legal services and for all clients (individual and corporate), regardless of the expected fee.

Courts Circulate Draft Rule

In June of 2001, the Administrative Board of the Courts voted in principle to adopt a new court rule requiring letters of engagement, and soon circulated a draft rule for public comment. The draft rule required lawyers to give every client a letter of engagement "at the commencement of representation" in all fee-generating matters unless the fee was expected to be \$1,000 or less or involved a domestic relations matter already covered by the special rules in Part 1400.

In October of 2001, the State Bar's Committee on Attorney Professionalism recommended that the Bar support the letter of engagement rule in principle, but suggested the following changes: (a) the fee exemption should be raised to \$5,000, (b) attorneys should be permitted to use a signed retainer agreement in place of a letter of engagement, (c) letters of engagement should not be required where attorneys had ongoing relationships with existing clients, and (d) attorneys should be permitted to provide a letter of engagement after the commencement of a representation where circumstances made it impractical to do so at the commencement.

In November of 2001, the NYSBA House of Delegates soundly rejected the proposal for mandatory letters of engagement, expressing what President Steven Krane described as "vehement opposition." Nevertheless, in January of 2002 the courts announced that they had adopted a letter of engagement rule that would govern all representations commenced after March 4, 2002. The rule as adopted reflected the Bar's concerns but did not directly adopt the Bar's suggested changes.

The New Rule's Requirements

Section 1215.1 states the requirements imposed by the new rule. Our treatment of the rule will read like a newspaper story - we will cover who, what, and when.

Who? Who is covered by the new rule? The rule applies to every attorney who "undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client" (Emphasis added.) Thus, any representation that begins on or after March 4, 2002 in which a lawyer is charging "any" fee is subject to the requirements of the rule unless an exception applies.

What? What are the requirements imposed by the new rule? The main requirement - indeed, the only requirement - is that an attorney "shall provide to the client a written letter of engagement" What must this written letter of engagement contain? To answer that question, we have to read §1215.1(b):

- (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, notice of the client's right to arbitration of fee disputes under Part 137 of the Rules of the Chief Administrator.

The first part of the letter should describe the matter the lawyer will be handling for the client. The description should be sufficiently precise to avoid any later confusion, and should make clear not only what services the lawyer will render but also what services the lawyer will not render. If the lawyer will be handling a specific transaction, for example, the letter of engagement should make clear whether the lawyer will handle any litigation arising out of the transaction. If the lawyer will be handling a litigation matter, the letter should state whether the lawyer will also handle any appeal. If a lawyer is negotiating with a failing company, the lawyer should state whether the lawyer will continue to handle the matter if the company files for bankruptcy.

The next part of the letter must describe three separate things: (a) legal fees, (b) expenses, and (c) billing practices. The letter should describe the legal fees in detail so that the client cannot possibly

misunderstand the basis for calculating fees. In a contingent fee matter, the letter of engagement must conform to DR 2-106(D), which states:

Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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, if not prohibited by statute, after the contingent fee is calculated....

Dealing With Expenses

Even when the lawyer will bill on an hourly rate, a flat rate, or on some other basis, the letter of engagement must describe the expenses for which the client will be responsible. The letter should simply list all of these - photocopying, express services, long distance, computer research, travel expenses, court reporter and transcript fees, filing fees, expert witness fees, etc. For good measure, the letter should state whether the client has given the lawyer authority to incur any or all of these expenses without obtaining the client's item-by-item consent. If the lawyer will be "marking up" any of the expenses, the lawyer must disclose both how much the client will be charged for those expenses (e.g., "Photocopies will be charged at 15 cents per page") and the fact that this charge is either above the lawyer's actual cost or includes a reasonable amount for general overhead and administrative costs associated with the particular expense. (*Caution:* ABA Op. 93-379 (1993) says that a lawyer may not charge more than the actual cost of "services provided by third parties", e.g., court reporters, expert witnesses, or travel agents unless the lawyer "incurs costs additional to the direct cost of the third-party services.")

Finally, the letter must describe the lawyer's "billing practices" for both fees and expenses. If the lawyer will be billing monthly, the letter should say so. The letter should make clear when late fees, if any, begin to accrue, and at what rate. If the lawyer has requested or received an advance retainer, the letter should set out the exact amount and whether that amount represents a minimum fee, a "general retainer," or a "special retainer," as well as the conditions under which the lawyer will refund any unearned portion.

In litigation matters, the letter should also make clear whether the lawyer will bill for litigation expenses periodically, or will instead advance the expenses until the conclusion of the matter. If the lawyer is advancing the expenses, the letter must state, pursuant to DR 5-103(B)(1), that the lawyer will hold the client "ultimately liable" for the expenses regardless of the outcome of the matter (unless the client is "indigent," in which case the lawyer may forgive the expenses entirely or make them contingent on the outcome). The lawyer must also state whether the client will be charged interest on the advances (and, if so, at what rate).

Providing Letter At Start of Engagement

When? Section 1215.1 ordinarily requires a lawyer to provide a written letter of engagement to the client "before commencing the representation" This is certainly the best policy for both the lawyer and the client because the letter of engagement should clear up any confusion before they have both invested time and resources in a matter. However, a lawyer may provide the letter of engagement to the client "within a reasonable time thereafter" in one of two circumstances:

- (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.

Providing the letter before commencing the representation may be "impracticable" if the client's matter requires immediate attention (*e.g.*, a temporary restraining order; a contract offer about to expire; a midnight call from a client who has been arrested or had an accident). If the matter does not require immediate attention, the lawyer should not begin any substantial work until the lawyer has sent the letter of engagement. "Impracticable" does not mean merely inconvenient, and is certainly not a license to procrastinate.

There may be rare occasions when the scope of the lawyer's services "cannot be determined" at the time the representation begins, although it's hard to see why that should ever happen. Suppose a new client, a manufacturer, is in a dispute with a major customer but has not yet decided whether to sue, negotiate, or refuse to ship further product. The lawyer may not know whether the scope of the engagement will be litigation, negotiation, or advice. But why can't the lawyer describe the scope as "evaluate client's dispute with major customer and advise client about options for resolving the dispute"? If the lawyer has also agreed to represent the client in litigation if the client chooses that option, the lawyer can add "and represent client in litigation if client decides to file suit." If not, the lawyer should add, "Lawyer's representation at this point is limited to evaluating various options and advising the client about these options. Lawyer will therefore take no specific action on client's behalf until client has given lawyer further instructions."

In other words, the lawyer always knows at some level of generality what is to be done. Otherwise, how can the lawyer "commence the representation"? (If the lawyer has not commenced the representation, of course, then no letter of engagement is required.) Accordingly, before a lawyer performs any work on a matter, even at the evaluation-and- advice stage, the lawyer should somehow describe, even in very general terms, what the lawyer will be doing. The description can easily be changed once the client decides which option to choose. Indeed, when the client is uncertain what path to choose, the letter of engagement may be especially important to clarify the limited nature of the lawyer's representation. Absent a description of the scope of the services to be rendered during the evaluation stage, a client may think the lawyer has agreed to file suit or to convey a settlement offer or to take some other specific action, whereas the lawyer may be waiting for further instructions before taking any action. The letter of engagement is intended to bridge exactly that type of communications gap.

In my view, therefore, the exception when the scope of services "cannot be determined" should rarely come into play. It may occasionally be "impractical" to take the time to describe the scope of the services before commencing the representation, but it is almost never impossible. The description may be general or tentative, and may mention several options, but it will protect both the lawyer and the client against the perils of misunderstanding.

As soon as the client decides on a specific course of action, however, the lawyer must update the letter of engagement to reflect the new realities. Thus, §1215.1 provides: "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." To illustrate, suppose a successful small corporation is being wooed by several larger players. The initial scope of the services to be provided might be to "study and evaluate various acquisition proposals

or overtures." Once the client selects a particular offer and tells the lawyer to "make it work" or "get it done," the lawyer must give the client an updated letter. This might describe the services as "study Acme Veeblefitzer Corp.'s offer to purchase client, negotiate final terms, and prepare all paperwork necessary to consummate the transaction." This simple description ought to be adequate. (Some lawyers will want to specify exactly what paperwork must be done, or describe how much authority the client is giving the lawyer to negotiate the terms, or describe other details about the services to be provided. That may be a good practice, but I do not think elaborate detail is required by §1215.1(b).)

The Exceptions

Section 1215.2 exempts a lawyer from providing a letter of engagement in three categories of matters: (1) the attorney expects to charge less than \$3000 in fees; (2) the attorney's services are of the "same general kind" as those the same client has previously received and paid for; or (3) the matter is a domestic relations matter subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR). In addition, § 1215.1(c) (which should more logically have been included in § 1215.2) states a fourth exception:

Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) 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).

I will address the exceptions one by one, but not in order.

Domestic relations matters. The exception for domestic relations matters covered by Part 1400 is clear enough - or at least as clear as it is in any other matter. The sweeping coverage of Part 1400 is explained in 22 NYCRR § 1400.1 ("Application") as follows:

This part shall apply to all attorneys who ... undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions, or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where a client is other than a minor, the provisions of section 1400.2 of this Part ["Statement of Client's Rights and Responsibilities"] shall apply to the extent they are not applicable to compensation.

Thus, domestic relations matters in any New York court are exempt from Part 1215. However, any attorney who uses the "domestic relations" exception to Part 1215 must comply with § 1400.2 by providing each "prospective" client with a Statement of Client's Rights and Responsibilities (in a form prescribed by the Appellate Divisions) "at the initial conference and prior to the signing of a written retainer agreement" - an earlier point than for matters falling within the reach of new Part 1215. In addition, domestic relations attorneys must provide each client with a written retainer agreement pursuant to § 1400.3 (also in a form prescribed by the Appellate Divisions), and this form must be "signed by both client and attorney." (Part 1215, in contrast does not require that the client sign the letter of engagement.) Thus, matters involving "divorce, separation, annulment, custody, visitation, maintenance,

child support, or alimony" - or to "enforce or modify a judgment or order" relating to such claims - are exempt from Part 1215 but the attorneys must satisfy the more onerous requirements of Part 1400.

"Same general kind." The exception in Part 1215.2 for services of the same general kind as those previously rendered to and paid for by the same client is more complex. The purpose is to save attorneys the trouble of delivering a new engagement letter (or entering into a brand new retainer agreement) for every similar matter undertaken for a client who already knows the lawyer's fees and billing practices, and has signaled agreement to those terms by paying a prior bill. Therefore, if a client has already paid a firm for a certain "kind" of legal services at least once, then the lawyer need not give that client a new letter of engagement next time the client retains the lawyer to render services of the "same general kind." For example, if a law firm has handled a loan closing for a particular lender before (and the lender has paid the lawyer's bill), then the law firm need not provide an engagement letter for similar future loan closings for that lender. If a law firm has handled commercial litigation for a client before, the firm need not provide a letter of engagement for the next piece of commercial litigation.

However, the exception for services of the "same general kind" may be a trap for the unwary. As we've discussed, § 1215.1(a) requires a lawyer to provide the client with an "updated" letter of engagement if there is "a significant change" in either the scope of the legal services or the fee to be charged. Even if the lawyer has rendered services of the "same general kind" to a client, a significant change in the scope of new services compared to the earlier matters would presumably call for an updated engagement letter. Similarly, if the firm has raised its fees or is charging fees on a different basis (e.g., hourly instead of contingent, or "value billing" instead of hourly rates), the requirement of an "updated" letter would arguably apply to the change in fees. And though the rule does not say so, an updated letter of engagement would arguably also be required if the lawyer is charging the client for additional categories of expenses not described in the original letter of engagement (e.g., temporary lawyers or on-line legal research services) or if the lawyer has significantly altered his billing practices (e.g., a late charge for overdue fees, or a carrying charge for expenses, or bills every 30 days instead of every 60 days).

In sum, Part 1215 probably requires an updated engagement letter for significant changes in any of the four categories covered by the rule - scope, fees, expenses, or billing practices - even if the lawyer has previously rendered and been paid for legal services of the "same general kind." The requirement for an "updated" letter of engagement reflecting significant changes thus swallows much of the exception that the courts added to lighten a lawyer's burden regarding existing clients.

Fee Amount. The exception for matters where "the fee to be charged is expected to be less than \$3000" is also complicated and will cause some problems for small practitioners. Consider a lawyer who agrees to represent the buyer in a routine residential real estate transaction, for which the attorney will charge a flat fee of \$1,200. No letter of engagement is required at the inception of the matter because the anticipated fee is under the \$3,000 threshold. However, if the sellers change their mind and refuse to close, the buyer may insist that the lawyer file suit or take other unusual measures to compel the sale. Since the expected legal fee for litigation or other coercive measures is likely to be above \$3,000, a letter of engagement will now be required. A similar situation is likely to arise whenever any run-of-the-mill transaction or service becomes bogged down in unexpected complexities or deteriorates into litigation. Thus, lawyers who typically charge flat fees under \$3,000 for routine transactions or services must remember to provide the client with a letter of engagement if the nature of the representation later changes so that the total fees including the flat fees for the initial engagement - are expected to reach or exceed \$3,000.

Providing a letter of engagement at this troubled point, however, may trigger a dispute with the client. Because the client did not receive any engagement letter at the commencement of the original routine representation, the client may argue that the flat fee covered not only the routine service, but also any related litigation or other non-routine services. "I hired you to get me this house," the client might say, "and you never told me that you would charge extra if the seller became unreasonable." The client is probably right - the lawyer probably did not explain the scope of the services covered by the flat fee, much less the services impliedly excluded.

Accordingly, lawyers who take advantage of the exception for matters in which the expected fee would normally be less than \$3,000 are likely to regret it if the transaction goes awry. As the State Bar recognized last year, the "best practice" is to enter into a signed retainer agreement with every client, even for routine transactions. If the transaction is really routine, then the retainer agreement is nothing more than a form letter. And any client who doesn't want to sign a form letter stating the basic retainer terms is likely to cause problems if the lawyer wants more money for "unusual" services later on.

"Signed written retainer agreement." As specified in § 1215.1(c), a letter of engagement is also unnecessary if a lawyer enters into a "signed written retainer agreement" with a client that covers the same ground that an engagement letter would have to cover. There is a slight advantage to substituting a signed written retainer agreement for a letter of engagement. A letter of engagement must be given to the client "before commencing the representation" unless this is "impractical" or the scope of services cannot yet be determined, but a signed retainer agreement may be entered into "within a reasonable time after commencing the representation" even if it would be practical to enter into the retainer agreement before the representation commences. The courts apparently felt that the added security of getting the client's signature on the terms governing the engagement justified giving the attorney a little bit longer to comply with the rule.

Sanctions For Violating The Rule

A curious feature of the new rule is that it does not expressly provide for any sanctions. It has been adopted only as a court rule, not as a Disciplinary Rule. Some court rules provide that a violation is also a violation of the Code of Professional Responsibility. For example, the court rules that limit fees in personal injury litigation provide that any fee in excess of the scheduled fee "shall constitute the exaction of unreasonable and unconscionable compensation in violation of ... the Code of Professional Responsibility ..." See, e.g., 22 NYCRR §603.7(e) (1st Dep't) and § 691.20(e) (2d Dep't). Other court rules specify precise sanctions. For example, 22 NYCRR §130-1.2, governing frivolous conduct in litigation, permits sanctions of up to "\$10,000 for any single occurrence of frivolous conduct." Still other court rules provide for an unspecified penalty. For example, §137.11 of the new mandatory fee arbitration rules provides that "[a]n attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action."

The new engagement letter rule, in contrast, neither contains its own sanctions provision nor provides that a violation of the rule will cause a referral to the disciplinary authorities. "This sends a message that this is not about attorney discipline in any way, shape or form," said Chief Administrative Judge Jonathan Lippman, "and we certainly do not expect in any significant degree there to be a large number of

disciplinary matters coming out of this rule." *Board Requires Clients Receive Written Letters of Engagement*, N.Y.L.J., Jan. 22, 2002, at 1. Why, then, should lawyers follow the rule?

In my view, attorneys should follow the rule because it protects them from several negative consequences. First, courts may refuse to enforce oral fee agreements that are not memorialized in a retainer or letter of engagement, making it difficult for attorneys to collect an unpaid fee.

Second, clients may have much greater success in certain legal malpractice actions if the attorney has failed to write a letter of engagement. For example, if an estate planning client alleges that his attorney failed to draft a trust agreement, but the attorney says he was only supposed to draft a will, a clear letter of engagement may settle the argument - but an attorney who has not furnished the client with a letter of engagement will be in a swearing contest with the client. Third, an attorney who fails to draft a letter of engagement is open to client complaints for violating DR 2-106(A) (charging an excessive fee), DR 5-103(B) (failing to hold a litigation client ultimately responsible for the costs and expenses advanced by the lawyer), or DR 6-101(A)(3) (neglect of a legal matter entrusted to the attorney), and other rules.

Fourth, any attorney who flagrantly fails to abide by the engagement letter rule risks discipline for violating broad "catch-all" Disciplinary Rules such as DR 1-102(A)(5) (providing that a lawyer or law firm shall not "[e]ngage in conduct that is prejudicial to the administration of justice"), or DR 7-106(A) (providing that a lawyer "shall not disregard ... a standing rule of a tribunal"), or DR 7-106(C)(6) (providing that a lawyer appearing before a tribunal shall not "[i]ntentionally or habitually violate any established rule of procedure"). And when Judge Lippman says he does not expect a "large number" of disciplinary matters to arise out of the new rule, he is not saying that he expects no disciplinary matters. An attorney or law firm that occasionally violates the rule, or that violates the rule in minor ways, probably has nothing to fear - but a law firm that repeatedly flouts the rule or totally ignores it is asking for trouble, including possible discipline.

Conclusion

The new letter of engagement rule is intended to put the attorney-client relationship on a sound footing from the very beginning, and to avoid unnecessary disputes between attorneys and their clients about legal fees and expenses. Attorneys generally dislike any new requirements telling them how to practice law, but attorneys who spend an hour or so studying the new rule and developing form letters of engagement to comply with it are likely to develop more productive attorney-client relationships and to increase the level of client satisfaction. Whether or not the courts were right to adopt a mandatory rule, they have done so, and attorneys should take time to study and comply with it.

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