

“You’re Charging Me for Text Messages?”

Communication Should Begin With Your Representation Agreements

By Melody Nashan

Clients don’t like surprise expenses any more than the rest of us. Clear communication, preferably memorialized in writing, will help prevent unwelcome surprises. A written representation agreement is a solid foundation for any lawyer-client relationship and should serve to protect both parties from misunderstandings.¹ Below are a few “do’s” and “don’ts” to consider at the beginning of a lawyer-client relationship.

Rule 4-1.5 requires that the scope of the representation and the fee arrangement be communicated to the client before or soon after representation begins. Although Rule 4-1.5 requires only that contingent fee contracts be in writing, it expressly reflects a preference that all representation agreements be in writing.² Further, written agreements constitute proof that the required communication as to all representations, contingent fee or not, has occurred.

WHO?

The best agreements are tailored to individual clients and matters. Especially when a family or a corporation is involved, it is important to identify the client precisely. Lawyers who take an extra few minutes to clarify the identity of clients will be grateful for that effort when disputes or conflicts arise regarding the person or entity represented.

WHAT?

It also is important for lawyers to adequately communicate the scope of the work to be performed. Rule 4-1.4 requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” If the client doesn’t understand the tasks, options, and goals to be accomplished, he or she cannot make informed decisions. Properly defining the scope of the representation informs the client of the

legal services to be rendered.

Adequately defining the scope of work also helps prevent “scope creep,” whereby the client expects more and broader services than initially contemplated by the parties. To prevent confusion, some lawyers specify – in writing – services that they recommend, but which are not part of the agreed-upon scope, and some specify services that merely were discussed by the parties but that are not within the scope of the agreement. Of course, the scope may later be enlarged by agreement, and a section should be included in the agreement specifying that the agreement may be modified by further written agreement between the parties.

Adequately identifying the scope, however, should not be confused with limiting the scope of representation. The scope of the engagement may not be so limited that it violates the lawyer’s duty to provide competent representation pursuant to Rule 4-1.1. Further, if it is limited as contemplated by Rule 4-1.2(c), an agreement as to the “essential terms of the representation and the lawyer’s limited role” must be in writing and the client’s consent to the limited representation must be informed. The agreement must specify what is covered, and what is not. For example, if the lawyer agrees to represent a criminal defendant, but as to pre-trial proceedings only, or if the lawyer’s representation will not include the pursuit of an appeal, such limitations must be included in a written agreement.

HOW MUCH WILL IT COST?

Communicating with the client regarding the dollars and cents required to pursue his or her goals is, of course, very important and is required under Rules 4-1.5 and 4-1.4. This communication will provide the client with some predictability. In today’s legal settings, attorneys’ fees most often are charged on an hourly, flat, or contingency basis. Whatever basis is used, the fee must be reasonable under the circumstances pursuant to Rule 4-1.5.

If the fee is to be hourly, the client must be told the hourly rate and whether an advance fee deposit is required. If the client is to be charged for work by anyone other than the lawyer hired, *e.g.*, a paralegal, the basis of the rate charged for those services also should be described. Lawyers should consider explaining generally how an hourly charge is incurred. For example, disciplinary complaints have included complaints from clients stating that they didn't understand that they would be charged for text messages or emails. While it may seem obvious to lawyers that responding to text messages or emails takes time just as other legal work does, client sophistication varies, and it is better to be overly explanatory rather than under. Additionally, other costs and expenses, such as travel time, long-distance telephone calls, postage, court reporter and deposition transcript expenses, and consultants' fees should be discussed and preferably memorialized. The client should be told when he or she is expected to pay or reimburse the costs and expenses, *i.e.*, whether the client must pay certain expenses before they are incurred or whether the lawyer will initially pay the expenses and then bill the client for reimbursement.

Flat fee representations, while seemingly simple, also require clear communication. Lawyers should describe conditions under which the amount might change, *e.g.*, if an uncontested divorce becomes contested. Further, remember that there is no such thing as a non-refundable fee. The fee is either earned or it's not.³ If it is not yet earned, it's refundable.⁴ Characterizing a fee as non-refundable is misleading and might unfairly serve to dissuade a client from exercising his or her right to terminate the lawyer's representation.

As stated above, contingent fee agreements must be in writing and must describe the structure of the fee. If the percentage that accrues to the lawyer changes according to the stage of the litigation, the agreement must reflect that progression. The agreement must provide whether expenses are to be deducted before or after the contingent fee is calculated. The agreement also must specify what, if any, expenses are payable by the client even if the client does not prevail. Additionally, at the conclusion of the matter, the lawyer must provide the client with "a written statement stating the outcome of the matter" and, if there is a recovery, the writing must include the amount paid to the client and how that amount was determined.⁵

If an initial deposit is required, lawyers should specify the amount and explain that it will be kept in a trust account until it is earned or used for costs and expenses. Communication should continue after the initial agreement or discussion regarding fees so the client is kept informed as to the

status of their deposit. Attorneys also should communicate what will happen when the client's deposit is depleted – whether they will be billed thereafter only as work is performed or expenses paid, or whether they will be expected to advance an additional deposit.

Lawyers who provide their clients with periodic billing statements describing services rendered and fees and expenses incurred seem to have fewer problems collecting payments. A lawyer's failure to provide regular billing statements may constitute a violation of Rule 4-1.4(b) because the client lacks reasonable information from which to make informed decisions during his or her representation. An example of this failure of communication would include a situation wherein a client is not billed through trial, and then discovers the fees owed are much greater than he or she anticipated and greater either than the amount they would have accepted or the amount they would have paid to have settled and avoided a trial. This type of communication failure often frustrates clients, and may trigger disciplinary complaints.

Lawyers may charge interest on fees if that arrangement was adequately communicated to the client at the beginning of the representation. The attorney must, however, comply with any applicable state and federal laws regarding the charging of interest.

A confirming writing also is required if attorneys' fees are to be split between lawyers who are not in the same firm. Such a division only may be made if the division of fees is in proportion to the service performed by each lawyer, or each lawyer assumes joint responsibility for the representation. The client must expressly agree to the association between the lawyers and that agreement must be confirmed in writing. The total fee, as always, must be reasonable.⁶

Additionally, a clause regarding literary or media rights may not be included in fee agreements. Rule 1.8(d) provides that, prior to the conclusion of a lawyer's representation of the client, the lawyer "shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

THE END (OF THE ATTORNEY/CLIENT RELATIONSHIP)

It also is important to communicate regarding the possible termination of the attorney/client relationship. Clients, generally, may discharge their lawyer at any time. "The attorney-client relationship is personal and confidential, and the client's choice of attorneys in civil cases is near absolute."⁷ A lawyer's right to terminate the

representation, however, is not so unfettered. Lawyers should communicate that they may terminate the relationship with the client's consent or for good cause, and they should explain what constitutes good cause.⁸

Very importantly, lawyers should describe what happens to the advance payments if the relationship is terminated. Lawyers should explain that they are entitled to be paid for the work done up to the time of discharge, but also that the client may be entitled to a refund if deposited monies remain after the lawyer is paid a reasonable fee based on the work expended on the case.⁹

A clause which purports to authorize the lawyer to cease work if the client is not current in paying his/her fees is improper. For example: "It is agreed that the case will not be set for trial until the payment of all fees and costs are current." Rule 4-1.3 provides that attorneys must diligently work on a client's case, unless the attorney withdraws from the representation. Further, Rule 4-1.16(b) provides that an attorney only may seek to withdraw if that withdrawal may be accomplished without "material adverse effect on the interests of the client." A lawyer may not withhold work if he/she has not been allowed to withdraw by the court. Outstanding invoices do not excuse violations of the Rules.

Neither may an agreement include a clause allowing the lawyer to withdraw without reference to the circumstances or compliance with the Rules. The following is an example submitted with a disciplinary complaint: "In the event of Client's failure to keep all attorney fees and costs current with the Attorney, Client acknowledges that the Attorney may withdraw from representing Client and Client hereby approves of such withdrawal based upon any future failure of keeping attorney fees and costs current. In the event of such withdrawal, Client understands that Client will be advised of the intent to withdraw prior to the withdrawal occurring and Client will sign all necessary documents to permit such withdrawal." This provision is in contravention of the Rules of Professional Conduct. Rule 4-1.16(b) provides that an attorney only may seek to withdraw if that withdrawal may be accomplished without "material adverse effect on the interests of the client." Further, lawyers may not force a client's "approv[al]" or force him/her to sign documents allegedly "permit[ting] such withdrawal." Rule 4-1.16 provides that attorneys may not withdraw if such withdrawal would materially hurt their client's case.¹⁰

The client should be informed that, upon termination of the representation, the client is entitled to his or her file. A limited exception applies if the lawyer has paid for certain items, such as a deposition transcript, and not been reimbursed. In that situation, the lawyer may retain that

item until he or she is reimbursed.¹¹

Note that attorney work product may not be withheld from the client's file. Disciplinary complaints too often are submitted with representation agreements that contain clauses purporting to exempt attorney work product from the client's file. "Those items which have commonly been denominated as 'work product' of the attorney actually belong to the client because those are the result of services for which the client contracted."¹² Further, the originals are the client's. Any copy the attorney wishes to keep must be made at the expense of the attorney.¹³

This discussion highlights a few topics about which lawyers should communicate with their clients, a few that must be included in an agreement, and a few improper provisions that have made their way to the OCDC. Of course, every representation is different and the required and necessary communication topics will vary depending on the circumstances of the representation.

ENDNOTES

1 The Missouri Bar has a publication called "Sample Fee Agreement Forms and Comments" that is available at www.mobar.org.

2 Rule 4-1.5(e) requires that any division of a fee between lawyers who are not in the same firm, and which division otherwise complies with the Rule, be agreed to by the client and "confirmed in writing." It does not, however, specify that the confirmation be included in the representation agreement.

3 A fee may be earned as a cost of processing the case through intake, or as a lost opportunity cost, but those situations must be adequately explained. Lawyers are not permitted to simply declare that the fee is non-refundable. Also, as with all fees, such fee earned from the intake process or the lost opportunity must be reasonable under the circumstances (viewed in retrospect). See Advisory Committee of the Supreme Court of Missouri ("Advisory Committee") Formal Opinion 128.

4 See Advisory Committee Formal Opinion 128.

5 See Rule 4-1.5(c). Also, note that contingent fees may not be agreed to, charged or collected in a domestic relations matter based "upon the securing of a divorce or dissolution of the marriage or upon the amount of maintenance, alimony or support or property settlement in lieu thereof," or for representing a defendant in a criminal case. Rule 4-1.5(d).

6 See Rule 4-1.5(e).

7 *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997), quoting *Koehler v. Wales*, 16 Wash.App. 304, 556 P.2d 233, 236 (1976); see also, *In re Downs*, 363 S.W.2d 679, 686 (Mo. banc 1963).

8 See Rule 4-1.16(a) and (b).

9 See *International Mat. Corp. v. Sun Corp., Inc.*, 824 S.W.2d 890, 895 (Mo. banc 1992), and *McCoy v. The Hershewe Law Firm, P.C.*, 366 S.W.3d 586, 599-600 (Mo. App. 2012), regarding fees payable after the termination of the attorney-client relationship where the lawyer had been retained on a contingency fee basis.

10 See, e.g., Informal Advisory Opinions 20000172, 960110, 940038.

11 See Advisory Committee Formal Opinion 115, as amended.

12 Advisory Committee Formal Opinion 115, as amended.

13 See Advisory Committee Formal Opinion 115, as amended.

Melody Nashan is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.