Retaining Ethics in Our Retainer Agreements

by Beth Kennedy

Although retainer agreements might be the documents we prepare most frequently in our practices, many lawyers do not give them much thought. But they are more than the trigger that starts a representation. A good retainer agreement ensures that the client knows what they can expect from you – and often equally important, what they shouldn't expect from you. And in preventing this confusion, a good agreement can help to prevent an OPC complaint or a malpractice action.

It's therefore worth the time to make sure our agreements hit all the necessary points. But where do we look for guidance? The rules of professional conduct don't require anything in particular to be included in a retainer agreement. In fact, they don't even require our agreements to be in writing (although they do require any contingent fee arrangements to be in writing). But the rules *do* govern our relationships with our clients. The retainer agreement is a great place to set the expectations for those relationships and to make sure they comply with the rules.

Here are some tips to consider for your next retainer agreement.

Define the client.

When a single person hires you to represent them in a case, there's no confusion about who you represent. But what if it's a CEO hiring you to represent a company? What if it's an insurance company hiring you to represent its insured? Or if the client's friend is footing the bill? The person signing your contract isn't always the person whose interests you are being hired to protect, and those two sets of interests might even diverge at some point.

The Rules touch on some of this. The Rules are clear that when you represent an organization or a governmental entity, you represent the organization, not any particular person within it. Utah R. Pro. Conduct 1.13(a), (h). And the Rules require us to clean up any confusion about this if there's ever a conflict between the organization's interest and the interest of a constituent we're dealing with. *Id.* R. 1.13(f).

Your retainer agreement should therefore expressly identify who you represent (and maybe even who you don't). An agreement that clearly defines the client can help to prevent confusion. It will let everyone know whose side you'll be on if there are ever conflicting interests and will protect you if someone later claims that they thought you were their lawyer.

Clarify the payment guarantor's role.

Similar situations arise when the client is not the one who is paying you. For example, it's not uncommon to have a family member foot the bill. But does that buy them the right to know what's going on in the case?

The answer is no. Rule 1.6 forbids us from revealing any information "relating to the representation of a client." *Id.* 1.6(a). So, if your client wants you to be able to talk to someone – their mom, their spouse – about their case, they'll have to give informed consent. *Id.*

The retainer agreement is a great place to handle this. If the client wants you to be able to share the information with someone, you can include a paragraph describing their rights and the risks involved. And you can say that, by signing the agreement, they're providing their consent to share the information with a particular person. Just be sure to include enough information to satisfy the definition of "informed consent" in Rule 1.0(f). That rule defines informed consent as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

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While you're at it, make sure the client also is giving informed consent for the payment guarantor to pay you. *Id.* R. 1.8(f)(1). It's imperative that the client understands the situation and agrees to it. This one doesn't necessarily need to be in writing, but if you know it's the plan, why not include it in the retainer agreement?

Limit the beneficiary.

It's also a good idea to make it clear that your work is for the benefit of *only* the client (this is another reason to define the client). Doing so will reduce the possibility that someone else can later claim to be a third-party beneficiary of your contract. This is important because your advice to a client might not be right for another person, even if they're in similar situations. Get rid of the possibility that someone else can claim you owe them a duty.

Define the scope.

It's also important to identify the work you're agreeing to perform. When you're handling the entire case, defining the scope of your representation is easy. But many of us are hired to handle just a part of the case – maybe only an initial demand letter, the district court proceedings, a single motion, or only the appeal. When that happens, make sure your agreement is clear about what you're handling – and what you're not.

This is important for a couple reasons. First, the rules require us to get informed consent any time we are limiting the scope of our representation. *Id.* R. 1.2(c). While the consent doesn't necessarily need to be in writing, the retainer agreement is an easy place to do this. And second, memories sometimes change over time. A written clarification protects us if a client later mistakenly believes that we promised to do something more than we signed up for.

Keep in mind, though, that it's not always up to us. Under Rule 74, we need permission from the court to withdraw if there's a motion pending or if there's a hearing or trial scheduled. Utah R. Civ. P. 74(a). So be careful. If your part of the case is over, but you're the only counsel of record, you could be left holding the bag.

Explain your fees.

Except for contingent fee arrangements, there's no requirement that we put our fee arrangements in writing – the Rules just say it's "preferabl[e]." Utah R. Pro. Conduct 1.5(b). But we can save a lot of time, headaches, and possibly even litigation if we do. Depending on the situation, there are a few things to consider making clear upfront.

First, what costs will you charge for? Printing? Copies? Staff time? Legal research? Travel? You should be clear in your agreement about any costs that will be passed on to the client. This will reduce the possibility of a misunderstanding. *Id.* R. 1.5 cmt. 2.

Second, how will you charge your fees? Hourly fees are the simplest to describe. But many cases stretch across years. Will your rates ever increase? If that's a possibility, say so.

Flat fees also are common. But resist any temptation to call the flat fee "nonrefundable." As our Ethics Advisory Committee has put it, "there is no such thing as a nonrefundable fee." Utah Ethics Op. 12-02 (2012). Instead, we need to put the flat fee in the client trust account and withdraw it only when we've earned it. Utah R. Pro. Conduct 1.15(c). If there's any part of the fee that we didn't earn, that part of the fee is unreasonable, and must be returned to the client. Why not explain all of this in the agreement and make our obligations crystal clear?

Contingent fees are a client favorite. In these agreements, be sure to clarify the percentage you'll receive so there's no dispute about it later. Also clarify what circumstances trigger your recovery. Is it only a judgment in their favor? What about a settlement? Leave no room for confusion. And unlike other fee

structures, these must be in writing. *Id.* R. 1.5(c).

And third, will you be sharing the fees with anyone? Utah is unique when it comes to fee sharing. In 2020, in connection with the sandbox, our Rules were amended to get rid of the prohibition on fee sharing with non-lawyers. (This used to be in Rule 1.5(e).) Now, Rule 5.4 expressly allows it. The implication is that lawyers also can share fees with each other, as long as the total fee remains reasonable. The Rules committee is currently considering amendments that could make this implication express. Either way, if you're sharing fees, you need to provide written notice to the client. *Id.* R. 5.4(c). The retainer agreement is another easy place to do that.

Explain the retainer.

Speaking of fees, it's a good idea to explain how the retainer is different. Clients who don't regularly hire lawyers sometimes don't realize that the money they give us upfront will be held in trust and isn't supposed to be applied to their monthly bills. Why not make this clear in the agreement?

Another thing to keep in mind (and to consider including) is that, like flat fees, retainers can't be nonrefundable. Any unearned portion must be returned to the client at the end of the representation. *Id.* R. 1.5 cmt. 4.

Warn about electronic communications.

The Rules are clear that we have a duty to communicate with our clients. *Id.* R. 1.4. They're also clear that we need to take precautions to protect those communications to prevent inadvertent or unauthorized disclosure. *Id.* R. 1.6(c). So what does this mean for us, particularly in a world where we communicate mostly by email, but where cybersecurity is becoming more of a risk and less of a guarantee?

It means we need to be upfront with our clients and warn them about the risks. We, of course, need to make reasonable efforts to prevent unauthorized access to our emails. ABA Formal Ethics Op. 477R (2017). But we can't control everything. Clients send and receive emails on their work computers that might be monitored by their employers. They use their laptops and smartphones on unsecure networks. And who knows what else they're doing.

Because of this, where there's still a significant risk that someone else could gain access to our communications – whether on our end or the client's end – we need to warn our clients. ABA Formal Ethics Op. 11-459 (2011). The retainer agreement is a convenient place to provide this warning.

What about unencrypted email? In 2000, our Ethics Advisory Committee opined that lawyers could use unencrypted email to communicate with clients. Utah Ethics Op. 00-01 (2000). The committee suggested that we just tell our clients if we were doing that. *Id.* Twenty-three years later, though, it's not clear that using unencrypted email satisfies our obligation to make reasonable efforts to protect our communications (it probably doesn't). But until we have authority on that point, if you're going to use unencrypted email (please don't), at least make sure you've notified your clients. *Id.* Your retainer agreement is a good place to do this.

Retain the right to be nice.

We all strive to comply with the Utah Standards of Professionalism and Civility. But we've all had clients who want us to take a scorched earth approach – they want us to refuse extensions (or any stipulations, for that matter), and to insert all kinds of colorful adjectives and adverbs into our writing.

They don't get to do that. While clients get to decide the objectives, they don't get the final word on the means. Utah R. Pro. Conduct 1.2(a). Admittedly, the distinction between those two things is not always clear. But why not try to prevent these battles before they begin? Consider having the client agree – in the retainer agreement – that you're going to comply with the standards.

Don't limit your liability for malpractice.

Most of these tips are optional. This one's not. The Rules are clear that a client cannot agree to limit our liability for malpractice (unless they're independently represented). *Id.* R. 1.8(h). This kind of clause unfortunately shows up in retainer agreements. Make sure it's not in yours.

Conclusion

From this perspective, retainer agreements can seem like a bit of a mine field, with provisions (or their absence) waiting to explode. But we can prevent this risk by putting in the time on the front end.

My advice? Review your standard retainer agreement to make sure it includes all the points discussed here. If you handle different fee structures or are sometimes hired by people other than the client you'll represent, consider preparing different forms for each situation. Yes, it takes time. But the more careful we are, the more likely it is that we can focus our energy on our practice instead of disagreements with clients.