Back to Basics: Reducing Risk through Engagement Agreements

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Attorneys can mitigate the risk of a malpractice claim from the moment a prospective client knocks on their door. A critical step to insulate an attorney from a potential claim—and even build in defenses to a future lawsuit—is through the thoughtful preparation of an engagement agreement.

Preparing an engagement agreement may seem routine, but its importance shouldn’t be overlooked. And attorneys should pay close attention to changes in the law governing engagement agreements. For example, in the past two years there have been several important decisions regarding the enforceability of arbitration provisions in engagement agreements. See Delaney v Attorney, 242 A3d 257 (2020) (holding that for an arbitration provision in a retainer agreement to be enforceable, an attorney must explain to a client the pros and cons of arbitration); Imman v Attorney, 2021 Wy 55 (2021) (applying Utah law holding arbitration provision in retainer agreement not void on public policy grounds); Tinsley v Attorney, __ NW 2d __ (Mich Ct App 2020) (holding arbitration clause in engagement agreement enforceable when client consults with independent counsel).

There isn’t a “one-size-fits-all” engagement agreement that works for every client and situation. So it’s important to include key terms of the representation in a written agreement to ensure the attorney and client are on the same page. The basic requirements include: 1) identifying the client, 2) defining the scope of representation, and 3) delineating the fees and anticipated expenses. Failure to do so could negatively affect the representation and, unfortunately, may lead to a lawsuit.

Frequently, such disputes arise out of disagreements about the scope of representation. In the event a client sues, the client’s new lawyer may weaponize any deficiencies in the engagement agreement to the attorney’s disadvantage. On the flipside, properly defining the scope of representation can be the key to defending against the lawsuit. There’s no way to ward off every potential lawsuit, but there are certain steps attorneys can take to limit their exposure with respect to defining the scope of representation.

Don’t Just Fill in the Blanks

An attorney-client relationship is contractual in nature. ABA Model Rule 1.2(c) provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Yet an engagement agreement that simply states: “Lawyer agrees to represent the client’s interests with regard to _________________. . . .” may not effectively define the scope of representation.

In a Michigan case illustrating this point, the plaintiff hired the defendant-attorney “to represent her in the sale of a restaurant and tavern business.” Chapman v Attorney, 411 NW 2d 754 (1996). Plaintiff later alleged that the attorney was negligent because they didn’t protect her security interest or draft a reassignment agreement. Arguing that the action was untimely, the defendant asserted that the plaintiff retained him only to assist with the sale and that the attorney-client relationship did not continue after the sale. The Court of Appeals agreed with the defendant. It wrote, “The defendant
was retained by plaintiff to perform a specific legal service, i.e., to advise and represent her in the sale of her business and draft certain documents in connection with the sale. Defendant was not retained to represent plaintiff in any pending or proposed litigation.” Although Chapman concerns the statute of limitations, it illustrates the importance of well-crafted engagement agreements.

The Michigan Court of Appeals reached a similar conclusion in Heller v Attorney, unpublished per curiam opinion of the Court of Appeals, issued March 13, 1998 (Docket No. 194219). In that case, the attorney and client agreed in writing that the attorney would represent the client in a business dispute. The agreement specifically excluded pursuit of any potential malpractice claims from the contractual terms of the relationship. Yet the client later blamed the attorney for not pursuing a malpractice claim. The Court of Appeals rejected that argument, holding that the attorney didn’t have any duties beyond what was specified in the agreement.

The Kansas Supreme Court has also weighed in on this issue. In Kansas Public Employees Retirement System v Law Firm, 44 P3d 407 (2002), the KPERS brought a legal-malpractice claim seeking to recover losses from an investment in a now-bankrupt company. The engagement agreement with the attorney defendants including drafting and preparing the purchase agreement on behalf of KPERS. The agreement also expressly provided: “In addition, we will perform such due diligence inquiries and activities as may be required by the investors in connection with its investment.” KPERS alleged that the law firm failed to provide proper financial and compliance advice regarding the transaction. The court determined that the law firm agreed only to those duties set forth in the engagement agreement, which did not include a duty to determine if the investment was prudent, dooming the legal-malpractice claim.

More recently, New York’s Appellate Division reiterated its law that an attorney may not be liable for failing to act outside the scope of an engagement agreement. In Attallah v Law Firm, 93 NYS 3d 353 (2019), the plaintiff, for whom the defendant attorneys agreed to represent on a pro bono basis, alleged that her attorneys failed to negotiate reconsideration of her expulsion from medical school. The engagement agreement, however, provided for a very limited scope of representation: “Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from [medical school]. This engagement does not, however, encompass any form of litigation . . .” Because the alleged failure to negotiate or commence litigation fell outside the scope of the engagement agreement, the appellate court upheld dismissal of the legal-malpractice claim.

### Identify Collateral Issues

The attorney-defendants in the above cases successfully defended against malpractice lawsuits based on the terms of their engagement agreements. However, simply defining the scope of representation may not always be enough. When a plaintiff’s need is multifaceted, an attorney should consider whether additional limiting language or other disclosures are necessary.

In Campbell v Law Firm, 642 NYS 2d 819 (Sup Ct 1996), the plaintiff was injured at a worksite and hired the defendant attorneys in connection with a workers’ compensation claim. The form retainer agreement provided that the firm would represent the client before the Workers’ Compensation Board. But the attorney-defendants did not specifically inform the plaintiff that the firm didn’t practice in areas other than workers’ compensation, or that any possible third-party claims should be handled by another attorney. The court held that an attorney has an affirmative duty to ensure that the client understands any limits imposed by the attorney on the extent of the work to be performed, and denied the attorney-defendants’ dispositive motion.
This is a relatively common occurrence. The Appellate Court of Illinois reached the same conclusion in a similar case, holding that a retained workers’ compensation attorney has a duty to advise an injured worker that they might have a claim against third parties, and that a third-party claim may be barred if not brought within the statute of limitations period. *Keef v Attorney*, 747 NE 2d 992 (2001). See also *Nichols v Attorney*, 19 Cal Rptr 2d 601 (1993).

In sum, identifying foreseeable collateral issues (including applicable limitations periods) and advising the client in writing about those issues are important steps in the client-engagement process.

**Follow Through**

Like any contract, an engagement agreement is the product of negotiation between the client and attorney. A client may ask the attorney to perform a specific task, which the parties could incorporate into the engagement agreement. When an attorney agrees to perform a specific task, it’s critical to follow through on that promise. Failing to do so could have unintended consequences.

Generally, claims against an attorney related to allegedly inadequate representation, however labeled, sound in tort and the malpractice statute of limitations applies. But plaintiffs can also allege harm to an interest other than a breach of the standard of care—for example, breach of contract. An allegation that an attorney failed to perform a specific task (rather than an allegation that the attorney negligently performed their duties) could have a longer limitations period than a malpractice claim.

That was the case in *Jones v Attorney*, unpublished per curiam of the Michigan Court of Appeals, issued December 22, 2020 (Docket No. 348378). In *Jones*, the engagement agreement expressly provided that the attorneys were retained to represent plaintiff “with respect to a divorce/Motion to Dismiss matter.” But the attorneys never filed the motion to dismiss. Plaintiff filed a complaint alleging legal malpractice and breach of contract. While the legal-malpractice claim was dismissed as untimely, the breach-of-contract claim survived. The Court reasoned that, in this instance, the plaintiff properly alleged a special agreement to perform a specific act, which is separate from the general agreement to provide competent legal representation. Thus, the plaintiff could maintain a separate breach-of-contract action.

Other states follow the same general rule that allegations that an attorney performed negligently, rather than failing to perform a specific task set forth in an engagement agreement, sound in tort. See, e.g., *Keonjian v Attorney*, 169 P3d 927 (2007) (allegation that deed was negligently drafted versus not having been drafted at all sounds in tort and is governed by the two-year legal-malpractice limitations period); *Letizia v Law Firm*, 292 So 3d 547 (2020) (holding that alleged breach of engagement agreement promising “to represent the Client(s) interest professionally and efficiently according to the highest legal and ethical standard” sounds in tort).

**Till Death Do Us Part**

For better or worse, not all engagements last forever. At the outset, it may not be possible to address when the attorney-client relationship will end. But a well-defined scope of representation in an engagement agreement can be useful to determine when, precisely, an engagement terminates. And that fact is critical when calculating the limitations period in a malpractice action.

Generally, a claim accrues at the time the attorney discontinues serving the plaintiff in a professional capacity as to the matters out of which the malpractice claim arose (See, e.g. Michigan’s accrual statute MCL § 600.5838). Determining the last date of service isn’t always easy. Sometimes the last date of service is clear; for example, when a client clearly
discharges the attorney by a certain date (i.e., by sending a letter stating that the attorney no longer has authority to act on their behalf), or when a client hires another attorney to replace their former counsel. Courts may consider orders, attorney billing, and other factors to determine the last date of service. But trouble may arise when attorneys represent clients in various matters or over a long period without properly defining the scope of representation in an engagement agreement. This is imperative both in litigation and non-litigation settings.

In Maddox v Attorney, 205 Mich App 446 (1994), an attorney provided representation with regard to the sale of a business. More than two years later, a problem arose with the security agreement for the sale. The clients called the attorney, who in turn performed some research and billed the clients for one hour of work. The court determined that performing the work and billing the client constituted a continuation of the representation, thus extending the otherwise expired limitations period on a malpractice claim. Similarly, in Red Zone LLC v Law Firm, 988 NYS 2d 588 (2014), the New York Appellate Court applied the continuous representation doctrine to toll the statute of limitations period when, after a two-year gap, the defendant attorneys provided additional legal advice and never communicated that the prior representation ended.

While it may be easier to ascertain the end date of a representation in the litigation setting (i.e., when a lawsuit ends), it’s not always clear cut. In Baright v Attorney, 198 Cal Rptr 510 (1984), plaintiff alleged he retained the defendant attorney to recover “all damages provided by law” in a workplace accident. The attorney handled the workers compensation claim for a matter of years, during which the limitations period for a third-party claim expired. The court determined that the broad language constituted continuous representation covering any time-barred third-party claims, tolling the limitations period while the attorney handled the workers’ compensation claim and saving the otherwise untimely legal-malpractice claim.

An engagement agreement can also be an attorney’s saving grace. In Hotchkiss v Law Firm, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 24, 2016 (Docket No. 270143), whether the plaintiff’s malpractice claim was timely hinged on whether the attorney’s representation ended in 2002 with a consent judgment of divorce, or continued post judgment. The initial engagement agreement expressly limited the attorney’s services to the divorce action and expressly advised that any additional work beyond entry of the divorce judgment would require another retainer. And, in fact, the parties entered into a second retainer contract specifically with regard to post-judgment issues. Because the representation was not continuous, and the malpractice claim related to the attorney’s pre-judgment representation, the claim was time-barred.

**Conclusion**

A poorly drafted engagement agreement may arm the client’s new lawyer even when the malpractice claim is otherwise weak. Preparing an engagement agreement that accurately describes the scope of representation can go a long way to avoid future headaches. Steps to consider include 1) carefully identifying the subject matter of the representation, 2) identifying and, if necessary, expressly excluding collateral matters from the representation, and 3) creating separate agreements when handling discrete matters for existing or long-term clients.

**About the Authors**

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