



## Newsletters

### Rules of Engagement: Setting the Proper Scope of Representation to Protect the Client and the Lawyer

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Ideally, the attorney-client relationship begins once a signed written engagement agreement is in place, which clearly outlines the clients who will be represented and the agreed scope of legal services. A properly drafted engagement agreement will document the expectations and obligations of both the attorney and the client. An engagement agreement, like any contract for services, reflects the "meeting of the minds" between the parties at the outset of the attorney-client relationship. In this sense, a well-crafted engagement agreement not only ensures compliance with the rules of professional conduct but also promotes client relations and helps protect against future legal malpractice claims.

#### I. Identifying the Clients to Be Represented

One of the most fundamental aspects of a properly drafted engagement letter is identifying the clients who will be represented. Lawyers cannot properly discharge their ethical duties unless it is clear from the outset who the clients are – as well as the parties they will not be representing. ABA Model Rule 1.13: Organization as Client provides that the attorney for an entity represents the entity itself and not its individual constituents. Moreover, it is the lawyer's responsibility when dealing with client entity members, officers, and employees to explain the identity of the client in circumstances where the organization's interests are adverse to those of the constituents. Thus, identification of the client is critically important for risk management purposes and in reducing the likelihood of claims by non-clients.

#### II. Establishing the Proper Scope of Representation

ABA Model Rule 1.5(b) requires that a lawyer inform the client of the scope of representation. While no degree of particularity is required under the rules, the best practice is to provide enough detail to identify the subject of representation and the general tasks to be performed. In addition to a basic description of the matter, the engagement agreement might identify, for example, the specific tribunal or forum for the representation, the business transaction to be completed, or set specific temporal limits. Similarly, in the case of local counsel retention, the engagement agreement should outline the discrete tasks divided between national and local counsel.

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A well-drafted retainer agreement that properly identifies the obligations the lawyer agrees to undertake can prevent unrealistic expectations, thereby fostering an effective client relationship. To this end, it is important to capture the client's understanding through a written acknowledgment signed by the client.

## A. Limiting the Scope of Representation

As the legal profession becomes increasingly specialized, careful attention should be paid to excluding those matters falling outside the scope of retention. Thus, while a brief description of the nature of legal services to be included in the scope of representation may be sufficient under some circumstances, a prudent attorney should also determine whether any reasonable limitations to the scope of representation should be reflected in the engagement agreement.

ABA Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer 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." Limitations on the scope of representation may be necessary for a number of reasons. For example, "[w]hen a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation." ABA Model Rule 1.2, Cmnt [6].

Similarly, a lawyer might desire to limit the scope of representation to work within the lawyer's current knowledge base or experience. Alternatively, the client may be comfortable proceeding *pro se* for most aspects of a case and desire assistance with the more complex aspects of a particular case.

Regardless of the underlying reason, any limitation to the scope of engagement must comply with ABA Model Rule 1.2, including that the restriction be reasonable and that the client provides informed consent.

### i. The Limitation Must Be Reasonable

While ABA Model Rule 1.2 "affords the lawyer and client substantial latitude to limit the representation, the limitations must be *reasonable* under the circumstances." ABA Model Rule 1.2, Comment [7]. Thus, any limitation "does not exempt a lawyer from the duty to provide competent representation; the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

For example, an estate planning attorney who is retained to prepare a simple will on behalf of a wealthy client with a complex investment portfolio may well run afoul of the reasonableness requirement contained within ABA Model Rule 1.2 despite an engagement agreement that limits the scope of representation to drafting a simple will. The attorney's failure to consider the tax consequences for a wealthy client likely violates ABA Model Rule 1.1, which requires the lawyer to apply the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Under such circumstances, a lawyer should explain the benefits of a comprehensive estate plan, the consequences of proceeding with a simple will, and obtain the client's informed consent to the limited representation.

### ii. Under Certain Circumstances, A Lawyer May Have a Duty to Identify Potential Claims and Remedies Excluded from Representation

Where the facts presented may implicate certain areas of the law, it is also important for an attorney to identify and then exclude potential alternative areas where the lawyer is not undertaking representation. For instance, courts have not only imposed the duty of an attorney to specifically identify tasks that will be performed but also to clearly identify alternative remedies and advise the client to consult with other counsel on those remedies.

For example, in *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1682 (Cal. Ct. App. 1993), an engagement agreement identified that the scope of representation included pursuing a workers' compensation action on behalf of an injured worker. After the injured worker learned he had a viable third-party personal injury action, after the statute of limitations expired, he sued his workers compensation attorney for malpractice.



The *Nichols* court reasoned the attorney had a duty to identify reasonably apparent legal issues "even though they fall outside the scope of the retention." The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs." *Id.* The court held that the attorney had a duty to identify other remedies and advise the client to consult other counsel to investigate those remedies.

### III. Revisit When Necessary

Every retainer agreement should contain language that a new agreement will be required for any matters falling outside the scope of the original agreement. It is generally expected, or at least desired, that as the attorney-client relationship continues, the lawyer's role may expand to include new matters and services. However, as circumstances change, so too should the engagement agreement. An attorney should be careful not to exceed the scope of the original engagement agreement without making the appropriate adjustments to the old agreement or supplementing it with a new agreement.