A to Z FEE agreements

BY SAMUEL A. THUMMA AND LYNDA C. SHELY

The cold call comes: "My husband and son were in a car accident and we need an attorney to get going on the matter before we start our 18-month assignment in Antarctica."

Or maybe it's a long-standing client who wants to expand the engagement: "Big Company, Inc., has been very pleased with your representation on some real estate transactions. We want to formally retain you generally for all of our matters in Arizona. Send us your retainer letter so we can send you the litigation files."

Or, more realistically, it may be: "Hi. I was given your name by someone, although I don't recall who. I just received some documents that look official and it's something about a default in my divorce case. I know it won't take much time but I need to talk with you about what I should do at a hearing next week."

Each of these calls is a potential beginning or continuation of an attorney–client relationship, and each comes with obvious—and hidden—perils. What is done in the few hours or days after such a call is received will be critical to provide clarity and certainty at the beginning of the engagement (and to avoid potential disputes and liability later). The best way to provide such certainty is through a written, well-thought-out and fair fee agreement.

This article discusses the legal sources that govern fee agreements, issues to consider in drafting fee agreements and appropriate use of a firm trust account. Also included is sample fee agreement language. Not every issue discussed will arise in every engagement. This article, however, is designed to provide an overview of many issues that can arise when a lawyer and a client establish the terms of the retention and how the proper use of a firm trust account will guide the resolution of those issues.

I. Authority Governing Fee Agreements

There are two general sources of authority governing fee agreements: contract law and ethical rules. Under contract law, the fee agreement must contain an offer, acceptance, consideration and sufficient certainty of terms.[1] Although there also may be statutory, regulatory and other legal requirements and limitations,[2] and although fees may be claimed under principles other than contract law,[3] fee agreements should be based on general contract principles.

Placed on this contract law foundation is an ethical overlay that may modify general contract principles.[4] For example, although an attorney may have a legal right to retain client property to secure payment, ethically, an attorney cannot retain client property if such action will prejudice the client.[5] As another example, although as a matter of contract law many oral agreements are enforceable, ethically, "a contingent fee shall be in writing."[6]

Along with case law, American Bar Association (ABA) Opinions and Arizona Ethics Opinions provide substantial guidance for ethical issues implicated by fee agreements.[7] Stated simply, however, what should and should not be contained in a fee agreement is based on what contract law requires and what is allowed ethically.

II. Issues To Consider

As a practical matter, all lawyers should use written agreements or letters of understanding to memorialize their relationships with their clients—for protection of the client and the lawyer. Whenever the terms of an ongoing representation change, the lawyer also should notify the client in writing. The suggestions below could, in theory, yield a 900-page agreement, which would be of no practical use. Accordingly, choose the terms that are appropriate for the engagement, the client and the practice area, and keep the rest for future reference.

A. Who Is the Client?[8]

Although the identity of a client may not seem like a significant issue when representing an individual, it is crucial to identify the client whenever a lawyer represents more than one individual, a group or an entity.

For instance, lawyers may be approached by a group of investors who want to form a corporation. Sometimes the lawyer will have a preexisting relationship with one or more of the investors. But who is being represented in the engagement—each of the investors individually, the investors collectively as co-clients, the to-be-formed corporation or some other entity?

Similar issues may arise when insurance is involved.[9] The fee agreement should specify exactly whom the lawyer represents, as well as how persons who are not considered to be the "client" will receive information from the lawyer and what information will be deemed "confidential."[4] The agreement should explain that there is no confidentiality between the co-clients; there is only confidentiality as to the outside world. Explaining how information will be shared among co-clients also is crucial whenever a husband and wife seek legal representation on a joint matter.

B. What Is the Scope of the Representation?

Clarifying the scope of the representation is not only crucial, it is required.[11] In transactional matters, the fee agreement should explain what portions of the transaction the lawyer will be handling and specify when the representation is anticipated to end (e.g., upon closing of a sale, upon execution of a contract, upon a certain date).

Frequently, clients misunderstand the nature of the representation—particularly when they have not previously retained counsel. Confusion over the scope of a representation was the fourth most frequent reason for a Bar complaint in 2000. If the attorney's practice includes limited representations, such as reviewing documents for clients who want to proceed *pro per*, it is even more essential that the limits of the representation be set forth in writing.[12]

Fee agreements should be specific about when the relationship (and the agreement) will end. Clients may believe that a lawyer will represent them through appeals or through continuing renegotiations of a contract over a period of years if the fee agreement does not specify that the representation only includes trial work or the initial negotiation of a contract.

C. Staffing

1. List lawyers and paraprofessionals.

One of the most frequent concerns expressed by clients about the bills they receive from a lawyer is seeing on the bill names of people they've never heard of or met. Fee agreements should note that other lawyers in the firm and paralegals or investigators may bill time to the matter and, if possible, include the others' names. If the specific names cannot be identified at the beginning of the representation or are subject to change, include the billable rates for the categories of professional who may work on the matter.

Billing statements should include the name of each person performing the work and their title (if the clients are unfamiliar with the name) so that clients understand who was working on their case.

Finally, make sure that the work billed reflects the title. For example, clients can be charged for professional time incurred on their matter but not for ordinary secretarial services. So if a lawyer or paralegal types envelopes for mailing pleadings, that should not be billed as legal time.[13]

2. Explain how temporary or contract lawyers may be used.

More and more lawyers are using temporary or contract lawyers to assist in research or as temporary help with large matters. This can reduce expenses and can be attractive to individuals who want a part-time work schedule. Clients, however, need to know who is working on their matter.

If there is a possibility that contract

lawyers will be used on a matter, say so in the fee agreement. Moreover, if the temporary lawyer is working for more than one firm, the temp may impute conflicts among the firms, to effectively make all the firms one firm for conflict purposes. To limit imputed conflicts from contract lawyers, establish a written arrangement with such lawyers that limits the scope of their work (e.g., for "X" client matter), length of employment and access to firm files beyond those for the relevant matter.[14]

3. Emergency coverage for solos.

Fee agreements between sole practitioners and clients also can include an explanation of what will happen if the lawyer becomes incapacitated or dies during the representation. Lawyers should explain to clients that they have made arrangements with a "backup" lawyer who will contact the client in such circumstances and provide the client with the complete file.

D. Co-Counsel

Affiliating with co-counsel can complement a firm's practice and provide particular expertise on a matter. If the client will be billed for the services of another lawyer from a different firm, the client must consent to the other lawyer's participation in writing.[15] Whenever two or more lawyers in different firms want to split a fee, it can only be accomplished by either (1) dividing the fee in proportion to the services each performed or (2) both lawyers remaining jointly responsible for the representation.[16]

By either method, the client must agree, in writing, to the participation of all the lawyers, and the total fee must be reasonable. In addition, if the firm retains another lawyer to consult on a matter and the cost of the consultation will be considered an expense, the expense should be passed through to the client at actual cost.

E. Insurance

Any good engagement checklist should include an inquiry by the attorney and representations from the client about insurance.

- Has the client investigated whether a claim is covered by insurance?
- Is the claim covered by insurance?
- Has the client placed the carrier on notice?
- Has the carrier confirmed coverage?
- Has the carrier confirmed a duty to defend?
- Has the carrier reserved rights?
- Does the client have a right, under the insurance policy, to select counsel?

The fee agreement is a good place to include a discussion of the issue to make sure that it is not overlooked and to make sure that the client has considered and researched the issue. At the inception of the retention, the client and attorney should know whether potential insurance coverage is being fully exploited. Moreover, the client will understand at the outset that the attorney is looking out for the best interests of the client (and addressing such issues early should make the attorney's malpractice carrier happy as well).

F. Fees And Costs

1. Determination (rates, premium billing, allocation of proceeds, fee shifting)

All fees, no matter how calculated, must be reasonable for the services performed.[17] Some fee arrangements have to be in writing (contingent fees and fees shared between firms), some are prohibited (contingent fees for particular domestic relations matters and all criminal defense matters) and others must be offered for a certain period of time (advertised rates).

Fees generally can be contingent, billable rate per hour, flat fee per matter, include the possibility of premium billing, or a combination of any of the above. There also is the possibility of fee shifting in certain types of cases.[18] Fee agreements should explain how the matter will be billed and can explain both potential liability for fee shifting

and how the bill will be determined if the shift is in favor of the client.[19] In the end, however, all fees must be reasonable.

2. "Retainers"

The term "retainer" should not be used unless the lawyer means a true retainer, which is an amount paid to a lawyer simply to be available to that client. A true retainer is earned upon receipt and goes into the operating account (not the trust account).

Most lawyers do not have many clients that want true retainers, and most fee agreements that mention "retainers" actually mean "advanced fees." If the agreement is intended to mean "advanced fees" and not a true retainer, say so. Explain to clients that advanced fees will be deposited into the trust account and either billed against that deposit by the hour or by the completion of specific tasks (or a combination). If the firm charges a non-refundable earned-upon-receipt fee, it actually is earned upon receipt of the money and must go into the operating account.

But remember: There really is no such thing as a non-refundable retainer, because non-refundable fees still must be reasonable for the services performed.[20] That means that they *are* refundable if not earned.

G. Billing/Credit Cards

Tell clients how billing will occur and bill regularly and with detail.

One of the most frequent complaints of clients going through fee arbitration is that they never received a bill or statement of fees until the end of the representation or after the representation terminated, and they had no idea how much they would be billed. Provide periodic billing statements containing an explanation of time billed or matters completed and give the client an opportunity to discuss bills with the lawyer. If the client has provided advanced fees that will be drawn upon to pay bills, explain the deduction and again offer the opportunity for the client to inquire about the bill before the money is

drawn from the trust account.

If the firm accepts credit cards, either for payment of earned fees or for advanced fees, explain whether the firm covers the cost of using the credit card or whether that expense will be charged to the client. In addition, most credit card companies will only permit a firm to establish card deposits into one account, which means the trust account. Accordingly, for credit card payments on earned fees, the firm will need to write a prenumbered check (see subsequent discussion on trust accounts) from the trust account to the operating account to properly disburse the earned fees.

H. Interest on Overdue Amounts

There are various limits on charging interest on overdue fees.[21] Stated simply, a lawyer cannot charge interest unless the fee agreement discloses the charge *and* the charge is reasonable. So, if you plan to charge interest on overdue amounts, make sure you use a reasonable rate and include a provision in the fee agreement stating that you will charge such interest and the terms upon which you will do so.

I. Contingent Fees and Premature Termination

Contingent fees must be in writing, must explain how they will be calculated and cannot be charged for criminal representations and most family law matters.[22] Unless a written fee agreement provides for a different method of calculation, a contingent fee representation that is terminated prior to the contingency occurring may result in the lawyer recovering under a *quantum meruit* theory.[23] The lawyer will be entitled to recover the reasonable value of the services performed; otherwise, the client would be unjustly enriched. *Quantum meruit* frequently is calculated on the number of hours reasonably expended by the lawyer times the billable rate. That formula, however, is not the only way to determine *quantum meruit,* which likely will focus on the benefit to the client (not the output of or cost to the lawyer).

J. Costs

Clients ultimately remain responsible for the costs and expenses associated with an engagement, but a lawyer may advance those costs.[24] Fee agreements should specify whether the lawyer will advance money to cover costs and expenses or whether the client will be required to pay for the expenses as the representation proceeds. All contingent fee agreements must specify whether the contingent percentage will be calculated before or after costs are deducted.[25]

Lawyers also must explain to clients that they cannot advance other money to a client, which is particularly true in a contingent fee case.[26] Typical expenses that cannot be advanced include living expenses, expenses for medical treatment, rent and rental car payments. However, a lawyer may gratuitously give money to a client if there is absolutely no expectation of repayment and it is intended solely to be charitable.[27] Lawyers also may assist a client in obtaining a loan that uses the potential case recovery as collateral, but the lawyer (1) cannot co-sign the loan and (2) should explain the risks of such financing to the client (especially if the interest rate is excessive).[28] Finally, a lawyer may waive her fees and costs at the conclusion of a case.[29]

K. Third-Party Liens

Lawyers who know that a third party has a "matured legal or equitable claim" in money that the lawyer may recover on behalf of a client have an ethical obligation to notify the third party of the receipt of the money[30] and may have an ethical duty to disburse money to that third party that is held in the firm trust account.[31]

Not every inquiry by a third party constitutes such a claim. A mere letter demand from a medical provider or copies of medical bills usually do not establish a matured claim.[32] If the client and the third party do not agree on the amount to be paid to the third party, the lawyer cannot continue to mediate the dispute but should interplead the funds.[33] Disputed money cannot be held indefinitely in the firm trust account and should be interpled promptly. A fee agreement for a matter that will have third-party claims can include a discussion of how the firm must handle such claims.

L. Client Responsibilities: Communicate and Assist

There cannot be effective representation if there is no communication—from the lawyer *and* from the client.

The fee agreement should set forth the obligations of the client so that it is clear from the inception of the relationship that the client has responsibilities. The primary client responsibility should be communication. Clients must keep the lawyer informed at all times of the client's address and phone number and must assist the lawyer in providing information necessary to the representation.

If a client fails to assist in the representation by failing to communicate with the lawyer, the lawyer may seek to withdraw (in litigation matters) or otherwise notify the client (preferably in writing to the client's last known address) that the lawyer needs to terminate the representation.[34]

Lawyers may want to discuss with clients that legal representation really is not like what they may see on television. For example, lawyers cannot lie for clients and cannot submit false information to a court. They cannot assist a client in committing a crime or a fraud or engage in a course of action that the lawyer feels is repugnant.[35] If the client insists on a course of action that would require the lawyer to violate *any* Ethical Rule, the lawyer *must* withdraw from the representation.[36]

Fee agreements can also include a statement that the lawyer has advised the client that if it becomes ethically necessary for the lawyer to withdraw from the representation, the lawyer will do so.

M. Lawyer Obligations

1. Communicate

How to avoid the number-one complaint received by the Bar about lawyers: Return phone calls promptly. This sounds fairly simple, but clients frequently have a distorted view of the word "promptly."

To avoid confusion, consider using the fee agreement to explain your policy on phone calls. For instance, if you are always in court from 10:00 until 4:00 each day and there is no way that calls can be returned until 5:00 p.m., say so in the fee agreement. That way, clients will not have the mistaken impression that you do not care about them when you do not return their 9:59 a.m. call until after 5:00 p.m.

Also explain that clients will be billed for each phone call and that they can contact the firm's support staff for certain information without cost. This also requires adequate education of the most important people in a law office—staff, including the receptionist and secretary. Staff training is crucial so that they can respond to client calls in a prompt, courteous and helpful manner—without, of course, providing legal advice.

2. Confidentiality

Some fee agreements note the lawyer's ethical obligation of confidentiality and explain how that applies to the representation. Lawyers must keep confidential all "information relating to representation of a client" regardless of the source and regardless of whether it is public knowledge.[37] Explain to clients that you will not disclose any information regarding the representation unless it is impliedly authorized to carry out the representation or otherwise ethically required.

A fee agreement can even explain that clients should not call their lawyers on mobile phones (and vice versa) or use electronic mail unless appropriate safeguards are taken.[38] It is not unethical to speak on a cell phone to a client or to use unencrypted e-mail, unless the subject of the conversation is of such a sensitive nature that heightened security reasonably would be expected.

N. Conflict Waivers/Withdrawal

In the near future, the ABA will propose that all conflict waivers be in writing and that the client be advised of the risks and afforded an opportunity to seek independent counsel on the waiver.[39] Lawyers should already be doing that. They also should be explaining to clients that if the waiver does not cure the conflict and the conflict resurfaces during the course of the representation (in the case of representing co-parties), the lawyer will be obligated to withdraw from representing everyone.

Another word of caution: Not all conflicts are waivable. Non-waivable conflicts include representing buyer and seller in a purchase and representing husband and wife in a dissolution. Moreover, open, prospective waivers are disfavored because it is presumed that the client(s) could not have been informed about all the risks.

O. Duties Upon Withdrawal/ Termination: Fees, Files, Substitution of Counsel

If the client owes you money and fires you, give the client the file.

If the client received copies of all the correspondence and filings that you created and received during the representation but you did not warn the client at the beginning of the case that the client would be receiving the "file" during the representation, give the client the file.

Each year Arizona lawyers are subjected to discipline for failing to return files to clients. Even if it will cost hundreds of dollars to copy the file for the client, give the client the file and do not charge for copying, with the following qualifications:

1. If you already have provided the client with the entire file and the client is in effect asking for a second copy of the file, then and only then can you charge for the cost of copying the file.[40]

2. If there is nothing pending and there is absolutely no reasonable argument that it would "prejudice the interests of the client" to hold the file hostage for owed fees, then you may be able to hold the file pending payment.[41]

Remember, though, there can be a huge downside risk in holding the file hostage if such action prejudices the client and there is little upside. For similar reasons, act promptly and professionally in substituting in new counsel.

P. General Business Account vs. Trust Account: Why Have Both?

Drafting and crafting a fee agreement requires a good understanding of the differences between the firm's business account and the firm's trust account. Both the Ethical Rules[42] and other Arizona Supreme Court Rules[43] require that attorneys have at least two accounts: the trust account and the general firm account. Trust account violations have risen to the fifth-most-frequent reason for a Bar complaint in 2000. Lawyers also must complete records and ledgers for all money going into and out of a trust account. Those records must document all transactions and must be maintained for five years. Only government lawyers and attorneys who handle money that is earned in full when received do not need a trust account.

If you believe that you do all of your legal work on a billing system that makes you complete the work (including advancing costs) before billing a client, you might think that you do not need a trust account. However, if you ever have clients pay court filing fees to you in advance of filing or if you receive any money that is not completely earned by you upon receipt, you need a trust account.

Q. Payments That May or Must Be Made From Trust Account

1. How long can you hold client money in trust?

A lawyer must notify the client and certain third parties promptly of the receipt of funds and disburse funds promptly.[44] In Arizona, there is no specific definition for "promptly" in the Rules of Professional Conduct. In other states, lawyers have been disciplined for waiting as little as two months to notify a client of the receipt of money.[45] Accordingly, lawyers should prepare a notice and accounting to the client as soon as possible after receipt of money held in the trust account.

Lawyers do not violate their ethical obligations if the client requests that the lawyer hold the funds for a period of time.[46] This assumes that the delay is not intended to harm or otherwise interfere with a third party's entitlement to the money. In short, however, if a lawyer fails to notify clients of the receipt of money and fails to disburse funds promptly, the lawyer will be disbarred.[47]

2. Payments to clients, third parties and the lawyer

The trust account should hold all money that is not owned by the lawyer. Appropriate disbursements from the trust account include payments to:

- the client
- third-party lien holders
- other third parties for the benefit of the client (such as filing fees and expert witnesses)
- opposing parties in settlement of a dispute
- the lawyer's general business account for earned fees

Payments to the lawyer should be made only with notice and an accounting to the client.

If there is a dispute between the lawyer and the client as to the amount of fees owed, only the disputed portion should be held in trust; disburse all other money to the appropriate recipient. If the client and lawyer cannot agree on the amount of fees to be paid to the lawyer, two proper methods of recourse are: (a) arbitration, mediation or other dispute resolution; or (b) interplead the disputed portion. If the client and lawyer agree to alternative dispute resolution, the lawyer may want to open a separate interest-bearing trust account so that interest earned will accrue for the benefit of the prevailing party.

R. Payments That Shall Not Be Made From Trust Account

There are some absolute bright line rules regarding what simply cannot be done with trust accounts, most of which are intuitive but some of which are not. For example:

- Don't pay your Bar dues, CLE registration fees or other State Bar bills from the trust account. Such checks will be returned to you because the State Bar accounting department is prohibited from cashing trust account checks.
- Don't make payments for your personal expenses from the trust account, even if the money is earned as fees. Instead, write a check to the general business account to keep the paperwork accurate.
- No wire transfers are allowed from trust accounts—even at the client's request.[48] The firm must make withdrawals from the trust account only by prenumbered check. However, money may be wired into a trust account.
- No ATM or debit cards on trust accounts.
- No overdraft protection on trust accounts.
- No "cash-back" when making a deposit into a trust account.

S. Commingling and Misappropriation—Don't Do It

Antother easy, simple rule for trust accounts is: Don't commingle client and firm/lawyer funds, and don't misappropriate client funds. At times, however, application of these simple rules can be more difficult than one would think.

For example, commingling can occur when an attorney

- has earned a fee but does not withdraw the earned fee from the trust account in a timely manner (e.g., payments for earned fees that are deposited into the trust account should be withdrawn promptly)
- writes a check from the trust account to the business account for a client matter to enable the attorney to wire transfer the money to the client or a third party
- deposits his or her own money in the trust account to make sure that no check ever bounces

Misappropriation can occur when, for example,

- an attorney deposits a check for client #1 today and, before that check clears, writes a check from the trust account to client #1 (because the attorney is actually using another client's money to cover that check)
- an attorney withdraws money from the trust account from a retainer and the attorney has not performed the work
- bank charges are withdrawn from the trust account and the attorney did not have funds in the account to cover the bank charge (although the rules permit deposits of firm money in the trust account "reasonably sufficient to pay service or other charges or fees imposed by the financial institution")[49]

Misappropriation will be disciplined even if there is no client harm and the misappropriation was only "temporary" (i.e., you cannot "borrow" money from the trust account to pay rent or other expenses even if you return the borrowed money to the trust account). Commingling and misappropriation can result in disbarment.[50]

T. What To Do With "Leftover" Money in the Trust Account

1. When the client is unknown

"Leftover" money that cannot be tracked to a specific client escheats to the state after seven years. A recent Arizona Ethics Opinion describes the steps lawyers must take when there is money in the trust account that cannot be attributed to a specific client.[51]

2. When the client is known but cannot be found.

The case is over and you secured a nice money judgment for your client.

The check arrives, you dutifully deposit it in your trust account, but you cannot find your client. What do you do?

The answer is a vague and daunting requirement to "exhaust all reasonable methods to communicate with the client."[52] You can, however, address the issue in your fee agreement.

Specifically, an exception to the requirement that funds promptly be delivered to the client is an "agreement with the client."[53] Setting forth what the client would like done in the unlikely event the client cannot be located may be of some assistance. Is there another individual who should receive funds if the client cannot be located? A family member? A friend? An institution? A charitable organization? Such alternatives may be helpful and, undoubtedly, will be better than the speculation required if the issue is not addressed and the client cannot be located.

Absent any sort of alternative designation, the required course is not particularly attractive to the client or the attorney. Although the issue has not squarely been addressed in Arizona, ethics opinions from other states indicate, "When the lawyer cannot find the client after reasonable efforts to do so, the funds should ultimately be disposed of in accordance with state law."[54] That would mean complying with Arizona's Uniform Unclaimed Property Act,[55] with the attorney to be reimbursed out of the funds "for reasonable expenses incurred" in trying to locate the client and being required to retain records of the funds for five years after tendering the funds to the State as unclaimed property.[56]

U. Dispute Resolution

1. Worse case: Suing a client

It should come as no surprise that a lawyer cannot continue representing a client if the lawyer sues the client for fees.[57] In a suit with the client, a lawyer may disclose information necessary to bring a claim against a client or defend against a claim made by a client.[58] This means that in a suit for fees, the lawyer

cannot disclose information about the representation simply to embarrass or harass the client; the information must be relevant to establish that the fees have been earned for legal services performed. Finally, contact your malpractice carrier before suing a client; your policy may prohibit such suits, which can be a bad surprise if not accounted for before taking any action to sue a client.

2. Bad case: Referring to a credit bureau

A lawyer may only refer a client to a credit reporting company if the client has previously consented to such a referral.[59] That means that a lawyer cannot unilaterally assign over or refer to a collection agency a client debt if that agency uses a credit bureau.[60] Lawyers may use collection agencies to collect overdue fees so long as the lawyer assures that the agency/company's conduct is compatible with the lawyer's ethical obligations. The lawyer should only disclose the minimum amount of information necessary for the agency to collect the debt, and the agency cannot disclose information beyond that reasonably necessary to disclose the debt.

3. Preferable: Fee arbitration

An attorney and a client may wish to include a dispute resolution mechanism in a fee agreement. Particularly given the concerns about confidentiality raised by typical litigation, such a mechanism may be an effective way to resolve any disputes without airing "dirty laundry" in the judicial system.

Such provisions may range from requiring an in-person meet-and-confer before suit is filed to binding, final arbitration. Although such provisions may provide the illusion of certainty, in practice, they can raise far more issues than they resolve.

For example, what rights does the fee agreement ask the client to waive (e.g., a right to discovery, the right to a jury trial, the right to retain counsel to present evidence on her behalf)? Can the client provide informed consent for such a waiver without seeking independent counsel? Can the client claim that informed consent was not provided? These issues need to be worked through at the outset, and fee agreements that include arbitration clauses should explain what rights a client waives by agreeing to arbitration. Moreover, even after such explanation, fee arbitration provisions may not be enforceable.[61]

The State Bar of Arizona's Fee Arbitration Program[62] is free, takes approximately four to six months to resolve a dispute and yields a binding award in fee and cost disputes between attorneys and clients and between attorneys.[63] Such a fee arbitration award can be reduced to judgment, if necessary, under Arizona's version of the Uniform Arbitration Act.[64] To avoid consent issues, among other things, "A jurisdictional prerequisite is an agreement to arbitrate signed by the parties *after* the dispute arises. The Fee Arbitration Program *does not* have jurisdiction to resolve a dispute if a party declines to be bound *or* based on an agreement to arbitrate entered into *before* the fee dispute arises."[65]

Thus, a fee agreement provision purporting to require that any dispute go to the State Bar of Arizona Fee Arbitration Program is not enforceable unless all parties again agree to such arbitration after the dispute arises. However, as an alternative to suing a client or contracting with a collection agency, consider proposing arbitration.

V. File Retention and Destruction

The fee agreement should discuss what happens to the file after the conclusion of the engagement and how long files will be retained after the conclusion of the engagement. This issue is not as straightforward as it might seem, and a recent Arizona Ethics Opinion provides some guidance.[66]

At the outset, a lawyer "should establish and maintain a written client file retention and destruction policy," which "must comply with all case law, rule and statutory requirements for document and file retention."[67] A copy of the policy should be given to the client before the termination of the representation or, at very latest, prior to the destruction of the file.[68] Such a policy should include an individual file review at the conclusion of the matter,[69] and in some circumstances, a lawyer may fulfill an ethical obligation by tendering the entire file to the client at the termination of the engagement.[70] The issue of retention, however, generally turns on what portion of the file belongs to the client and what portion belongs to the attorney.

File materials obtained from the client generally are owned by the client, and the attorney must use "reasonable efforts to return all client property, including such materials, upon termination of the representation."[71] Materials owned by the client may not be destroyed until "a reasonable effort to return such property has been made and a reasonable notice of destruction has been given."[72] After such notice, such materials still must be safeguarded for a period of time equal to that under Arizona law for the abandonment of personal property.[73]

The balance of the file generally belongs to the lawyer, subject to the client's reasonable expectation arising from the representation and "the client's post-representation need for access."[74] "Indefinite file retention for probate or estate matters, homicide cases, life sentence cases and lifetime probation cases is appropriate. File retention of five years for most other matters is appropriate," although the length of retention turns on the "client's anticipated reasonable need for the file materials," considering statutes of limitation, and length of sentence or probation.[75] When discarding a file, either shred the file or use a document destruction company in order to preserve the confidentiality of information in the file—do not simply throw the file in the trash.

W. Post-Engagement Matters

Both the lawyer and the client should think ahead to what will occur

after the engagement. In addition to issues discussed elsewhere (return of files, fees, etc.), a lawyer may wish to address what the attorney and firm may do after the engagement.

Obviously, an attorney may not use non-public information in any representation of any other client. Subject to that substantial caveat, however, the attorney and the client may agree that the attorney may continue to represent or undertake future representation of existing or new clients in any matter that is not substantially related to the services provided to the client, even if the interests of such other entities are directly adverse to those of the client. Addressing those issues in writing at the inception of the engagement is the best way to attempt to make plain what can and cannot be done after the engagement.

X. Other Ethical Issues

In addition to all of the details on trust accounts noted previously, remember the following:

- Disbursements from a lawyer trust account, to anyone, can only be made by prenumbered check.[76]
- A trust account check that is returned for insufficient funds automatically will be reported to the State Bar by the relevant financial institution.[77]
- Non-lawyer employees may have signatory authority on a trust account, but the lawyer ultimately is responsible for assuring the proper use of the account.[78]
- Do not keep a "cushion" of your own firm money in the trust account above and beyond the amount necessary to cover reasonable bank charges—that constitutes commingling.

Y. Other Contract Issues

As with any contract, consider whether there should be a severability clause that permits the remainder of the agreement to continue in effect if any portion of the agreement is held to violate any laws. In engagements with multiple out-of-state clients, consider whether a choice of law provision is needed. Along with these issues, consider whether there are other contract issues that should be spelled out in the fee agreement.

Z. Other Issues To Consider

There are a wide variety of additional issues to consider when drafting a fee agreement.

For example, given Arizona's unique disclosure rules that may have the effect of front-loading litigation costs, consider whether some sort of disclosure about those rules and how they can affect litigation expense is helpful for out-of-state clients. The disclosure obligations also affect the need for cooperation early on in a matter and may be material to a decision by the client whether to file a motion to dismiss, seek removal to federal court or attempt to seek an early settlement of the matter.

For a contingent fee, does the lawyer want an "out" if the client does not wish to accept an offer that the lawyer believes is reasonable and should be accepted (and if the lawyer does not wish to be an indentured servant going forward)? Also for a contingent fee, the lawyer may wish to address how a settlement with payments received over a period of years should be handled. There may be a host of other issues that specific engagements will raise. The point is to try to identify and address those issues when establishing the rules of the engagement.

CONCLUSION

There is no need—practically or technically—for a 900-page fee agreement. That said, there is a clear need for a written fee agreement for most engagements. The topics to be addressed in each fee agreement will turn on the specific issues and facts involved in the engagement. This article identifies many (but certainly not all) such issues and provides some possible ways to deal with some of those issues. Although there is no magic in any of this, these issues should be considered and, if relevant, addressed in a written fee agreement at the outset of the engagement. Such efforts will provide clarity and certainty and avoid subsequent disagreement and ethical, legal and loss prevention issues that otherwise may arise.

Samuel A. Thumma *is a Director at Brown & Bain, P.A., and Chair of the State Bar of Arizona Fee Arbitration Committee.* ***Lynda C. Shely*** *is Director of Lawyer Ethics at the State Bar of Arizona.*

The views expressed in this article are those of the authors and do not necessarily represent those of the State Bar of Arizona, the State Bar's Fee Arbitration Committee or Brown & Bain, P.A., or its clients.

endnotes

1. *E.g., Schade v. Dietrich*, 760 P.2d 1050, 1056-58 (Ariz. 1988); *K-Line Builders, Inc., v. First Fed. Sav. & Loan Ass'n*, 677 P.2d 1317, 1320 (Ariz. Ct. App. 1983).
2. *E.g.,* 45 C.F.R. § 1611.8(a) (specifying retainer agreement for Legal Services Corporation matters).
3. *E.g., State Farm Mutual Ins. Co. v. St. Joseph's Hospital*, 489 P.2d 837, 841 (Ariz. 1971) (*quantum meruit*) (dicta); *Schwartz v. Schwerin*, 336 P.2d 144 (Ariz. 1950) (*quantum meruit*).
4. *E.g., In re Struthers*, 877 P.2d 789, 794-95 (Ariz. 1994) (finding prohibited under *ethical* rules what agreement, under *contract* law, expressly authorized).
5. *See generally National Sales & Service Co., Inc. v. Superior Court*, 667 P.2d 738 (Ariz. 1983).
6. ER 1.5(c), Rule 42, ARIZ.R.S.CT. Contingent fee agreements also "shall state 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 after the contingent fee is calculated." The American Bar Association's Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") has proposed that attorneys be required to obtain written fee agreements for all new clients and new client matters.
7. *E.g.,* ABA Comm'n on Ethics and Professional Responsibility, Formal Op. ("ABA Formal Op.") Nos. 90-358, 93-372, 93-373 (reverse contingent fees); 93-379 (prohibited billing practices); 94-388 (disclosing law firm affiliations); 94-398 (contingent fees); 96-403 (limitations on defending insureds); Ariz. Bar. Comm'n on Rules of Professional Conduct Op. ("Ariz. Op.") 86-09 (interest on overdue amounts); 94-10 (percentage surcharge in lieu of actual expenses and costs); 94-02 (how not to write a fee agreement); 99-02 ("non-refundable" fees); 98-07 (client files). The State Bar of Arizona Web site contains full-text versions of recent Ethics Opinions in searchable form at www.azbar.org/EthicsOpinions/.
8. For representations in which someone other than the client is paying the legal fees for the client, *see* ER 1.8(f) and Ariz. Op. 99-08 (lawyers cannot follow litigation guidelines imposed by insurance companies for representation of insureds).
9. *See generally Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001).
10. *Cf.* ER 1.13 ("Organization as Client").
11. ER 1.2.
12. *See* Ariz. Op. 91-03.
13. *See In re Ireland*, 706 P.2d 352 (Ariz. 1985).
14. Ariz. Op. 97-09; *see also* Ariz. Op. 2000-10 and ABA Formal Op. No. 00-420 for a discussion of how temporary lawyers should and should not be billed to clients as well as how a temporary agency ethically can be paid.
15. ER 1.5(e).
16. ER 1.5(e).
17. ER 1.5(a).
18. *See, e.g.,* A.R.S. §§ 12-341.01(A), 12-349.
19. Lawyers should explain to clients that they will have to submit to the court proof of time spent in order to claim a fee award. *Schweiger v. China Doll Restaurant, Inc.*, 673 P.2d 927 (Ariz. Ct. App. 1983).
20. *See In re Hirschfeld*, 960 P.2d 640 (Ariz. 1998); Ariz. Op. 99-02.
21. Ariz. Ops. 2000-07 and 86-09.
22. ER 1.5(c) and (d). *But cf.* Ariz. Op. 93-04 (can charge contingent fee to collect spousal maintenance arrearages).
23. *See State Farm Mutual Ins. Co. v. St. Joseph Hospital*, 489 P.2d 837, 841 (Ariz. 1971) (dicta); *Schwartz v. Schwerin*, 336 P.2d 144 (Ariz. 1950).
24. ER 1.8(e).
25. ER 1.5(c).
26. ER 1.8(e).
27. Ariz. Op. 91-14.
28. Ariz. Op. 91-22.
29. Ariz. Op. 91-13.
30. ER 1.15(b).
31. Ariz. Op. 98-06.
32. *Id.*
33. ER 1.15 *cmt.*
34. ER 1.16(b)(4) (providing for permissive withdrawal when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled").
35. ERs 1.6(c), 3.3, 3.4, and 1.16.
36. ER 1.16(a)(unless required to continue representation by a tribunal, "a lawyer shall not represent a client or where representation has commenced, shall withdraw from the representation of a client if … the representation will result in violation of the Rules of Professional Conduct or other law").
37. ER 1.6(a).
38. Ariz. Ops. 97-04 and 95-11.
39. *See* ABA Ethics 2000 Proposed Amendments to the Model Rules of Professional Conduct.
40. Ariz. Op. 93-03.
41. *See* Ariz. Op. 98-07.
42. ER 1.15.
43. Rules 43 and 44, ARIZ.R.S.CT.
44. *See* ER 1.15(b) and (c); *In re Struthers,* 877 P.2d 789 (Ariz. 1994) (lawyer disbarred for failing to notify client of receipt of funds, failing to give each client an accounting of fees earned and failing to disburse promptly).
45. *In re Fraser,* 515 N.Y.S.2d 359 (App. Div. 1987).
46. *In re Brooks,* 854 P.2d 776 (Ariz. 1993).
47. *In re LaLonde,* 834 P.2d 146 (Ariz. 1992).
48. Rule 43, ARIZ.R.S.CT. *State Bar Arizona Trust Account Guidelines,* at 2(c) ("All trust account disbursements shall be made by pre-numbered check").
49. Rule 44, ARIZ.R.S.CT.
50. *See, e.g., In re Davis,* 628 P.2d 38 (Ariz. 1981) (commingling settlement proceeds with lawyer's own funds and using proceeds for his own benefit resulted in disbarment).
51. Ariz. Op. 97-03.

52. Ariz. Op. 90-11 at 3 (citing Ariz. Op. 80-11 at 2); *see also* Ariz. Op. 97-03 at 4.
53. ER 1.15(b).
54. Ariz. Op. 97-03 at 4-5 (citing authority).
55. A.R.S. §§ 44-301 *et seq.*
56. Ariz. Op. 97-03, at 5.
57. Ariz. Op. 2000-03; *see also* common sense.
58. ER 1.6(d).
59. Ariz. Op. 94-11.
60. *See* Ariz. Op. 98-05 (finding, among other things, that it is unethical for a lawyer to sell client accounts receivable "to a factor, even with the consent of each client involved after consultation, because the client cannot have received from the lawyer sufficient information regarding the effects of disclosure." "It is unethical for a lawyer to enter into a factoring agreement calling for the outright sale of client accounts receivable because the agreement constitutes a sharing of legal fees by a lawyer with a non-lawyer.").
61. Ariz. Op. 94-05 ("Mandatory arbitration provisions certainly may serve a lawyer's self-interest. … A client waives important interests, not the least of which is the right to have their disputes with their lawyers resolved by a jury." Such a provision constitutes a business transaction with a client and "a lawyer ethically may ask a client to agree to a retainer agreement clause providing for mandatory arbitration of the client's malpractice claims if the lawyer: (1) ensures that the arbitration clause is fair and reasonable to the client; (2) fully discloses, in writing and in terms that can be understood by the client, the advantages and disadvantages of arbitration, including, for example, the waiver of the right to trial by jury; (3) gives the client a reasonable opportunity to seek the advice of independent counsel; and (4) obtains the client's written consent to the agreement. Nothing in this opinion is intended to address the legal enforceability of such arbitration terms.").
62. *See generally* State Bar of Arizona Fee Arbitration Rules of Arbitration of Fee Disputes, available at www.azbar.org/PublicResources.
63. *See generally* Samuel A. Thumma & Lynda C. Shely, *The State Bar of Arizona Fee Arbitration Program,* ARIZ. ATTORNEY, March 1999, at 28.
64. A.R.S. § 12-1501 *et seq.*
65. Thumma & Shely, supra note 64.
66. Ariz. Op. 98-07.
67. *Id.* at 10.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 9.
73. *Id.* (citing Ariz. Op. 91-01). Ariz. Op. 98-07 notes that, at present, Arizona's version of the Uniform Unclaimed Property Act contains a five-year holding period. *Id.* at 9 n.5.
74. Ariz. Op. 98-07 at 10.
75. *Id.*
76. Rule 43, ARIZ.R.S.CT. *State Bar of Arizona Trust Account Guidelines,* at 2(c).
77. Rule 44(d), ARIZ.R.S.CT.
78. ER 5.3.

sample FEE agreement

The following is sample language that may be considered in drafting a fee agreement addressing some (but not all) of the issues discussed previously. If this article demonstrates nothing else, it shows that there can be no "one size fits all" model fee agreement. Accordingly, provisions listed here will need to be modified, amplified or omitted as appropriate. The language does, however, provide some guidance as to how some issues described in the article may be addressed in trying to effectively deal with a client when drafting a fee agreement.[1]

1. The source of this text originates with prior fee agreements used by the authors and others (which have evolved over time) as well as sample fee agreements used in prior State Bar of Arizona Continuing Legal Education seminars.

DATE

Dear Clients:

I am writing to confirm the terms under which Law Firm, LLC (the "Firm") proposes to represent [INSERT SPECIFIC CLIENT(S) TO BE REPRESENTED] (the "Clients") in connection with [INSERT DESCRIPTION OF ENGAGEMENT WITH REASONABLE DETAIL]. We appreciate your decision to retain the Firm in this matter. So that we all clearly understand the basis upon which we have agreed to represent you, I have prepared this letter.

1. Clients Represented. It is understood that our Clients for the purpose of this representation are [INSERT], and not any of Clients' individual members or any other entities whose interests in this matter are being represented by those individual members.

2. Staffing. Other Attorney and I will have primary responsibility for the matter. Particularly at the outset, we expect to perform the bulk of the work and I have enclosed a copy of our resumes. We also may utilize other attorneys, paralegals and litigation/clerical assistants where appropriate. Staffing decisions will be made by me, with the objective of rendering services on an efficient and cost-effective basis.

Our representation is effective as of the date we first begin providing services to you as a result of the requested representation. We will undertake your representation and work with you to achieve the desired objectives by using our best judgment and skill in representing you. You understand that we cannot and have not made any guarantee regarding the outcome of the matter.

3. Fees. [FOR "HOURLY RATE" ENGAGEMENT: We anticipate billing for professional services in accordance with Rule 1.5 of the Rules of Professional Conduct promulgated by the Arizona Supreme Court, primarily based upon the schedule of hourly rates established by the Firm for the lawyers and other members of the professional staff of the Firm. In order to help us determine the value of services that we render, our attorneys, paralegals and document clerks maintain written records of the actual time they spend working for Clients. The hourly rates are based on years of experience, specialization in training and practice and level of professional attainment. We periodically review our hourly rates and make adjustments as necessary. My currently hourly rate is $ [INSERT RATE] and Other Attorney's current hourly rate is $ [INSERT RATE.]

[FOR CONTINGENT FEE ENGAGEMENT: Clients have retained the Firm on a contingent-fee basis and agree to pay and assign to the Firm: (1) twenty-five (25) percent of the gross amount recovered by settlement prior to the filings of a complaint; (2) thirty-three and a third (33-1/3) percent of the gross amount recovered by settlement after a complaint is filed but before a trial is commenced; (3) forty (40) percent of the gross amount recovered during or immediately after the first trial, by settlement or otherwise; or (4) forty-five (45) percent of the gross amount recovered if an appeal or further action is taken after the first trial. Any award of attorneys' fees will be included in calculating the gross amount. Except as provided in the next paragraph, attorneys' fees will be payable only out of amounts recovered. If no recovery is obtained, no fees will be payable to the Firm. Clients will, however, remain liable for all costs incurred on their behalf regardless of recovery.

The Firm may waive their right to fees and withdraw as counsel for Clients at any time upon giving reasonable notice. Clients may terminate this agreement at any time before settlement or ultimate recovery upon giving reasonable notice. In the event this agreement is terminated by the Firm before settlement or ultimate recovery, no fees shall be payable to the Firm, but Clients shall remain responsible for payment of all costs advanced by the Firm. In the event this agreement is terminated by Clients before settlement or ultimate recovery, Clients agree to pay the Firm their fees at the hourly rates customarily charged by the Firm for all time reasonably spent by the Firm on Clients' behalf before Clients' termination of this agreement, plus any costs advanced.]

4. Costs. In addition to our fees for services, Clients will be responsible for all out-of-pocket disbursements that we incur on their behalf. Typical of such costs are travel expenses, long-distance telephone calls, outgoing fax (at INSERT RATE per page), Federal Express, courier services, and delivery charges, photocopying (at INSERT RATE per page), and online database retrieval charges (Lexis, Westlaw, etc.). We anticipate making advances to cover out-of-pocket costs incurred but reserve the right to forward to Clients any larger items with the request that they pay them directly to the service providers.

5. Billings. Our statements for services rendered and costs incurred will be prepared and mailed to the address listed above during the month following the month in which services are rendered and costs advanced. We will make every effort to include our out-of-pocket disbursements in the next monthly statement. However, some disbursements are not immediately available to us and, as a result, may not appear on a statement until sometime after the charges were actually incurred. All statements are due and payable upon receipt and considered past due thirty (30) days after the statement date. The Firm reserves the right to decline to perform further services if any account is sixty (60) days or more past due. Subject, of course, to our ethical and professional obligations, Clients must agree that the Firm may terminate its legal services and withdraw from this engagement in such event.

6. [Advance Deposit. It is our policy to ask clients without an established payment history

with the Firm to provide us an advance deposit before commencing work. We believe that it is appropriate here and an advance deposit of $ [INSERT AMOUNT] is requested. Except as provided herein, the advance deposit amount will be held by us in a trust account until our representation is concluded. If any monthly statement is not paid before coming past due, we will have the right, in our discretion, to apply the amount being held in trust to Clients' outstanding balance. Should that become necessary, Clients will still be responsible for any remaining balance, and we will have the right to withdraw from further representation if it remains unpaid. If we use the advance deposit to pay an outstanding statement, we reserve the right to notify Clients that we have done so, whereupon Clients will then promptly replenish the advance deposit so that at all times there is $ [INSERT AMOUNT] on deposit. If the advance deposit is not replenished within [INSERT] days, we reserve the right to terminate our representation.]

7. [***Obligations As Local Counsel.*** We recognize that our role in this matter is to serve as local counsel for Out-of-State Firm, which will have principal responsibility for the litigation. We also understand you wish to avoid the undue expense that would be incurred in having two firms duplicate their efforts in this matter. However, even as local counsel, we are required by the applicable rules to exercise a continuing responsibility to conduct a reasonable inquiry to ensure that pleadings and filings are well grounded in fact and law and otherwise meet the applicable standards. Accordingly, although we understand and will seek to accommodate your interest in avoiding duplicate legal fees, our professional obligations compel us to undertake activities and investigation deemed necessary to discharge these obligations.]

8. [***Fee Shifting.*** The matter for which Clients have retained us is one in which attorneys' fees may be recovered by the prevailing party from the losing party. Although if Clients prevail, we will press a claim asking the Court to award you your fees incurred in this matter, please also understand that, if Clients lose, the other party may attempt to shift their fees to Clients. Moreover, the provisions under which a Court may shift fees generally leave that decision to the discretion of the Court to decide whether, and in what amount, to award fees.]

9. Settlement. The Firm will not enter into a settlement without Clients' consent.

10. Clients' Responsibilities. Recognizing that the Firm cannot effectively represent Clients without their cooperation and assistance, Clients agree to cooperate fully with the Firm and to provide promptly all information known or available to Clients relevant to the Firms' representation, including providing information and documents requested in a timely fashion; assisting in discovery, disclosure and trial preparation; cooperating in scheduling and related matters; responding to telephone calls and correspondence in a timely manner; and informing the Firm of changes in Clients' address and telephone numbers.

11. Arizona Disclosure Rules. It is important that Clients understand how Arizona's rules of civil procedure may apply to this case. Arizona's rules substantially change the litigation process that Clients may be familiar with from federal court or from other states. The purpose of the rules is to reduce the time and expense involved in civil litigation. The rules encourage early Court involvement in case management, require disclosures by the parties and contain presumptive discovery limits. For example:

A. The rules require each party to file a detailed, verified disclosure statement forty (40) days after the last responsive pleading. The disclosure statement must detail nine categories of information, including all facts and legal theories upon which Clients rely for any claim or defense, the identities of all persons whom Clients believe may have knowledge or information relevant to the case, and a description of all documents relevant to the subject matter of the case. The disclosure statement must be updated continuously during the litigation within thirty (30) days after new or different information is discovered.
B. Each side is entitled to only one independent expert on an issue.
C. Absent agreement or court order, only parties and expert witnesses may be deposed, and depositions are limited to 4 hours in length.
D. Deposition objections and conferences with the deponent are limited.
E. There is a presumptive limit of forty (40) interrogatories, including subparts, for each party.
F. There is a presumptive limit of no more than ten (10) distinct items or categories of items for requests for production.
G. There is a procedure for mandatory settlement conferences.

There are numerous rules that give the Court the power to impose sanctions on a party or an attorney for failure to comply with these rules.

There are several aspects of the rules that have a direct impact on how we proceed with the case. The rules require Clients and their attorneys to conduct a reasonable inquiry and investigation about all matters to be revealed in the disclosure statement as described in Ariz.R.Civ.P. 26.1. We have the duty to investigate facts that are good *and* bad for Clients. The failure of Clients or their attorneys to conduct a reasonable inquiry and investigation into these topics, and to disclose all relevant information, may subject Clients, their attorneys, or both to sanctions. Furthermore, any evidence favorable to Clients that is not timely disclosed in accordance with Rule 26.1 cannot be used at trial.

I shall assume that you have talked or will talk with someone knowledgeable about all the facts that give rise to Clients' defenses. You or we need to talk with all the people that may have information about the case. You or we need to identify and review all documents that may be relevant to Clients' defenses or to plaintiff's claims.

As you can see, one effect of the rules is to "front-load" a lot of the legal investigation and analysis to be done in this case. Obviously, this will also "front-load" some of Clients' legal expenses. However, please keep in mind that the other side must abide by these same rules, and that a benefit to be derived is that both sides should know relatively early on in the litigation the relative strengths and weaknesses of their cases. The rules were designed precisely for that purpose, to allow both sides to assess the whole case well in advance of trial, and to focus their resources on exchanging information and resolving the dispute rather than waging discovery battles.]

12. [Joint Representation. The Code of Professional Conduct, as adopted in Arizona, permits the joint representation of multiple clients where a lawyer can adequately represent the interests of each client and each client knowingly consents to that joint representation. At this point, I believe that we can represent both Clients adequately in this case. Based on the information available to us, there currently appear to be no conflicts of interest among Clients that would prevent us from undertaking their joint representation. However, although the interests of Clients may be similar in many respects, they may not be identical in all respects, and a conflict may develop at some later date. Any time an attorney represents several parties in litigation, certain conflicts of interest may arise among the parties. There are times when strategic decisions differ with respect to different parties. For example, a dispute could arise between Clients as to whether or not to settle and on what terms. If at any time any of the Clients becomes aware of any conflict or potential conflict between their interests and those of other of the Clients, I ask that they immediately call that to my attention so that we can consider whether we can continue to represent any of the Clients in this case.

In the ordinary one-lawyer/one-client relationship, information given to the lawyer by the client in confidence as part of the representation may be considered privileged or confidential information (i.e., the lawyer may not disclose that information to any other person without the client's consent or as required by law). That privilege also exists in the context of a joint representation, but there is an added factor. The privilege extends to protect the confidences of the entire group from disclosure to any person who is not a member of the group. However, information that any of the Clients provide us in connection with this joint

representation is available to all of the other Clients. There will be no confidences among us regarding the work we do for Clients. In other words, if we receive information from or about one of the Clients that we believe the others should have in order to make decisions regarding the subject of our representation, we will share that information with them or with the whole group.

In order to assure that we represent their interests in a coordinated manner, and so long as no conflict develops between and among the interests of the Clients, we will take our direction from the group as a whole as it reaches its consensus on various issues. If Clients disagree on an issue, we will ask that the members of the group resolve their differences among themselves without our assistance. Although we perceive it to be unlikely, in the event circumstances arise that make it impossible for us to continue to simultaneously represent one of the Clients, we trust that they understand that we might have to withdraw from our representation of all Clients. In the event a dispute does arise between any of the Clients, the Firm may only be able to represent one of the parties in the dispute, and, under certain circumstances, we may be precluded from representing any party to the dispute. Consequently, we must ask that Clients' agreement to our engagement encompass that situation as well.]

13. [Representation of Other Client. As we have discussed, the Firm has represented and continues to represent Other Client on unrelated matters. Because our ethical duty to all of our clients requires us to avoid acting in a manner that is prejudicial to the interests of any other client, you must understand that we are not permitted to allow our role in this litigation to involve the rendering of advice or other services that appear to us to be prejudicial to the interests of Other Client. Based on the information available to us, we do not think it likely that such a situation will arise, but you must recognize this possible limitation on our ability to represent Clients. Moreover, we must ask that you agree that if such a situation should eventuate, we may refuse to undertake a particular service or may withdraw from our representation of Clients in the matter. At this point, based on the information available to us, we reasonably believe that our representation of Clients will not be materially limited by our responsibilities to Other Client nor anyone else.]

14. Advance Waiver of Conflicts. As we have discussed, the Firm represents many other companies and individuals. It is possible, if not probable, that some of our present or future clients could have disputes or transactions with Clients. Therefore, as a condition to our undertaking this matter, Clients must agree that the Firm may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for Clients, even if the interests of such entities in those other matters are directly adverse to Clients. We agree, however, that Clients' prospective consent to conflicting representation contained in this paragraph shall not apply in any instances where, as a result of our representation of Clients, we have obtained privileged, proprietary or other confidential information of a nonpublic nature that, if known to such other entity, could be used in any such other matter by such entity to Clients' material disadvantage.

15. [Spousal Affiliation. As we have discussed, my husband ("Husband") is an attorney at Other Firm. From the filings to date, we understand that Other Firm represents defendant Other Corporation. It is my understanding that Husband does not now and has never personally represented that entity. Moreover, I will request that Other Firm take precautions to ensure that Husband does not have any participation in the matter. In addition, a wall of silence will be placed between Husband and I to ensure that there is no possibility that privileged or confidential information will be shared with him. My marriage to Husband and his affiliation with Other Firm will not limit or affect in any way our responsibilities to you or adversely affect our representation of you in this litigation.]

16. Document Retention. During the course of our representation of Clients, they may have occasion to provide us with documents and other materials from their files. At the end of our engagement, we will return the documents and materials to Clients in care of your office, or retain them as Clients direct. If we receive no such direction from Clients, and the documents and materials are not returned to Clients, we would like Clients' agreement that the documents may be destroyed at such time as the file itself is destroyed in accordance with our document retention policy. Currently, it is our policy to destroy files after they have been closed for ten (10) years. We will deem Clients' acknowledgement of our engagement as an assent to the handling of Clients' documents in this respect.

17. Termination of Engagement and Post-Engagement Matters. Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect Clients' interests in this matter and, if you so request, we will suggest to you possible successor counsel and provide successor counsel of your choosing with whatever papers you have provided to us. Unless previously terminated, our representation of Clients will terminate upon our sending our final statement for services rendered. Clients are engaging the Firm to provide legal services in connection with a specific matter. After completion of the matter, changes may occur in laws or regulations that are applicable to Clients that could have an impact upon their

future rights and liabilities. Unless Clients continue to engage us to provide additional advice, this Firm will assume that it has no continuing obligation to advise Clients with respect to future legal developments.

18. Insurance Coverage. In connection with our representation of Clients in this matter, Clients have been informed that if Clients have comprehensive or commercial general liability insurance policies, Clients may be entitled to insurance coverage for this matter. If Clients have policy(ies) that may provide coverage, Clients should notify the insurer(s) of this matter and tender the defense of the matter to preserve any rights Clients may have to coverage of the claim and/or defense costs. If Clients prefer, and if any such policies exist, we would be happy to review those documents and advise Clients of the possibility of such coverage. To date, however, we have not been informed that any such coverage exists and have not been provided any such policies. Accordingly, unless we receive such information from Clients, we cannot take any such measures.

19. Arbitration. If a dispute arises between the Firm and Clients regarding [attorneys' fees] [the services provided in the engagement], the parties agree to resolve that dispute through [mediation before any suit is filed] [mediation followed by arbitration through [INSERT] arbitration service] [arbitration through [INSERT] arbitration service]

20. No Advice Regarding This Fee Agreement. The Firm is not acting as Clients' counsel in advising them with respect to this letter, as we would have a conflict of interest in doing so. If Clients, or any of them, wish to be advised by independent counsel on the question of whether they should be so represented, we recommend that they consult with independent counsel of their choice. In addition, if they have any questions or would like additional information, we would be happy to discuss this matter with any of them.

I am enclosing two originals of this letter. If the foregoing correctly states our understanding regarding the Firm's representation of Clients, please have an appropriate representative of Clients sign one of the originals in the space provided and return it to me at your earliest convenience.

Very truly yours,

Laura Lawyer
Enclosures

THE TERMS OF THE ENGAGEMENT OF THE FIRM AS STATED ABOVE ARE ACCEPTED AND APPROVED BY:

_____

CLIENTS