The Ethical Engagement Agreement

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I. Purpose of engagement agreements

A. Identify client and project to be done
B. Manage client expectations
C. Provide certainty and agreement on terms of engagement before dispute arises, and method for addressing dispute if it does arise.

II. What must be in writing

A. Rule 1.5(b): When a lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

1. Basis of the fee: The structure of the fee - hourly, contingent, or flat fee. Not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. Comment 2, Rule 1.5.

2. Rate of fee: The method of calculating the fee based on the fee structure, such as the hourly rate or contingency percentage.

3. Written disclosure of basis and rate of fee has been required since 1999.

4. Disclosure need not be signed by client. Email disclosure is acceptable.

5. Rule 1.5(a): A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

B. Chapter 23.3, Colorado Rules of Civil Procedure: Governs all contingent fee agreements in Colorado. See Rule 1.5(c).

1. Contingent fee agreement is defined as "a written agreement for legal services of an attorney … under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement." Chapter 23.3.

2. Contingent fee agreement must comply with requirements of Chapter 23.3 or it is unenforceable by lawyer. *Mullens v. Hansel-Henderson*, 65 P.3d 992 (Colo. 2002); *Brody v. Hellman*, 167 P.3d 192 (Colo. App. 2007).

III. What Should be In Writing: The Material Terms of the Engagement

A. Client should be identified.

1. If an individual client, make sure it is the person who owns, controls or has decision making authority with regard to the water rights in question.

2. If an organization client, identify spokesperson and chain of authority.

a. Obligations to organizational clients are governed by C.R.P.C. 1.13. See CBA Ethics Opinion 120.

b. Include language regarding lawyer's obligations to an organizational client:

Example: As lawyers, our conduct is governed by the Colorado Rules of Professional Conduct, which provide that when a lawyer=s client is an organization, the lawyer=s duties are owed to the organization as a whole, and not to any one constituent, such as a director, officer or manager. However, since an organization must operate through its constituents, we will take direction from Mr. Smith and Ms. Jones or such other person as Client Company may direct, unless we have an ethical obligation to do otherwise.

B. Subject matter of representation should be identified.

1. Risky to describe subject matter of representation as "water matters" because the representation may never end, and client may have expectation that lawyer will monitor resumes, and will not represent other clients on the stream system.

a. This may be what a lawyer intends to do when representing a water provider, conservancy district, or other major water rights holder.

b. Not always what lawyer intends to do with "one project" representations, such as getting a small augmentation plan decreed.

c. Clear scope of representation is especially important if representation includes obtaining a conditional water right or a decree with retained jurisdiction.

2. Engagement agreements often provide for representation in a particular matter "and such other matters as you may bring to the firm."

a. A short update to engagement agreement identifying subsequent matters is advisable.

C. Attorneys who will work on the matter should be identified.

1. Engagement agreement should identify lead counsel, and also provide that other attorneys and staff of the firm will also work on the matter, if that is the case.

2. If a lawyer who is not a member of the firm will be working on the matter, the client must agree to in writing to the arrangement for division of fees. The division must be in proportion to the services performed by each lawyer, or each lawyer must assume joint responsibility for the representation; the client must agree to the basis and rate of the fee; and the total fee must be reasonable. Rule 1.5(d).

3. Neither written disclosure nor client consent is required if a law firm uses a contract attorney, where payment of the hourly rate to the contract attorney is not contingent upon the client's payment of the law firm's fees. However, if the contract attorney's pay is dependent upon the client's payment of the fees, Rule 1.5(d) applies. See CBA Ethics Committee Abstract 96/97-15.

D. Provisions for rate increases should be included.

1. Rule 1.5(b): "Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)."

a. Unclear if a "written fee agreement" is the same as the written disclosure of the basis and rate of fee required by Rule 1.5(b).

b. A material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client. When a change in the basis or rate of the fee is reasonably likely to benefit the client, such as a reduction in the hourly rate or a cap on the fees or expenses that did not previously exist, the change is not material for purposes of Rule 1.5(b), and compliance with Rule 1.8(a) is not required. Comment 3A, Rule 1.5.

2. Rule 1.8(a) provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

3. Comment 1 to Rule 1.8(a) provides that Rule 1.8(a) does not apply to ordinary fee arrangements between client and lawyer, but the comment states that the requirements of Rule 1.8(a) must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.

a. The initial engagement agreement is not a "business transaction" between lawyer and client. However, if provisions for fee increases are not part of the original fee arrangement, Rule 1.8(a) may apply to "midstream" changes in the fee agreement.

b. Rule 1.8(a) applies if lawyer takes security interest in client's property, or acquires a portion of client's business - even if this is part of the initial fee agreement.

E. Costs.

1. Payment of costs by client must be provided for in engagement agreement.

2. Cost recovery cannot be a profit center for the law firm.

3. Computerized legal research (Westlaw) is addressed in a variety of ways in engagement agreements.

F. Provisions for retainer

1. Retainers, and any other client funds not "earned" by lawyer must be held in trust account until earned. Attorney "earns" a fee only when the attorney provides a benefit or service to the client. Rule 1.5(f); *In re Sather*, 3 P.3d 403 (Colo. 2000).

2. Engagement agreement should explain that retainer will be deposited in COLTAF trust account, in most cases. (If the amount is large or will be held for a long time, an interest-bearing trust account should be established for the benefit of the client.) Rule 1.15(e) and (f). Retainer funds may be applied to final bill, or ongoing bills. Engagement agreement may provide for renewing client's trust account balance if it falls below a certain amount.

3. Attorneys cannot enter into "non-refundable" retainer or fee agreements. Rule 1.5(g); *In re Sather*, supra.

G. Provisions regarding payment and non-payment

1. Lawyer may accept credit card payments, provided that certain protective measures are implemented, and provided that the lawyer consults with the client prior to acceptance of credit card payments. Lawyer should advise client that the use of a credit card necessarily involves some disclosure of confidential information and should explain what information relating to the representation will be disclosed. CBA Ethics Opinion 99. This information should be included in engagement agreement.

2. Lawyer may charge interest on past due accounts, but this must be included in a prior agreement between the attorney and client confirming that interest will be charged if a fee is unpaid for more than a specific period of time. CBA Ethics Opinion 66. An attorney may not unilaterally charge interest.

3. Lawyer may take a security interest in client property to secure payment of fees. This is a "business transaction" with a client and is subject to Rule 1.8(a). See CBA Ethics Opinion 110. If a security interest is part of initial engagement, Rule 1.8(a) compliance should be reflected in engagement agreement.

4. Lawyer may withdraw from representation if 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" Rule 1.16(a)(5). The engagement agreement should provide that the lawyer and law firm may terminate representation for nonpayment of fees or costs within the required time period. In some cases before a court, withdrawal may not be allowed. Rule 1.16(c) (When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.)

H. Completion or Termination of Employment

1. Upon completion of a client's matter, lawyer should send a letter advising client that representation in the matter has been completed. The letter may address file retention also.

2. A client may terminate attorney's employment at any time, and lawyer should send a confirming termination letter. Any agreement that purports to restrict a client's right t terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited. Rule 1.5(g).

3. A lawyer may withdraw from representation as provided in Rule 1.16. Current Rule 1.16 is more flexible than the old Rule 1.16. Current Rule 1.16(a)

addresses mandatory and permissive withdrawal, and includes provision for withdrawal if client does not pay fees or costs (Rule 1.16(a)(5)), if the representation will result in an unreasonable financial burden on the lawyer (Rule 1.16(a)(6)) or “other good cause for withdrawal exists (Rule 1.16(a)(7)).

4. Upon termination of representation, a lawyer must take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. Rule 1.16(d).

I. Provisions regarding file retention.

1. Existing rules already address retention of certain files, client communications and client property. Rule 1.15(a) and (j) require a lawyer to maintain certain law office finance and accounting records for seven years; retention of client property is addressed in Rule 1.15(a) (b) and (d). C.R.C.P. Chapter 23.3, rule 4 requires retention of contingent fee agreement and proof of mailing following completion or settlement of a case, and C.R.C.P. §1-26(7) requires retention of signed originals of e-filed documents for two years).

2. CBA Ethics Committee and the Supreme Court’s Standing Committee on Rules of Professional Conduct are proposing a new Rule 1.16A regarding client file retention. As proposed, rule will require files to be retained for at least two years following completion of representation, and destroyed thereafter only following written notice to the client of lawyer’s intention to destroy the files after a date certain, which must be at least 30 days from date of the notice, so long as there are no pending or threatened legal proceedings known to the lawyer. Alternatively, client files may be destroyed without notice to the client after ten years from the termination of a representation in a matter, so long as there are no pending or threatened legal proceedings known to the lawyer. If adopted, this rule should be referenced in the engagement agreement. This rule will not provide a “safe haven” for lawyers who destroy client property (as distinct from files) or who should retain files for a longer period, for example, files pertaining to wills or certain criminal matters. If a file retention rule is adopted by the Supreme Court, engagement agreements should reference file retention/destruction as required by the rule.

3. In the absence of a file retention rule, engagement agreement should advise client that file may be delivered to client after completion of representation or, if it is retained by the lawyer, it may be destroyed after some defined time period.

Example: Upon completion of our services, the files pertaining to this matter will be delivered to you or closed and placed in storage. Files in our possession may be destroyed five years after completion of representation.

J. Dispute resolution provisions in engagement agreements.

1. Engagement letters may provide method for dispute resolution, but cannot be unreasonable. If a procedure has been established for resolution of fee disputes, such as the CBA's Legal Fee Arbitration Committee, the lawyer should conscientiously consider submitting to it. Rule 1.5, comment 9. Note that the client can always question the reasonableness of a fee. Rule 1.5.

2. Arbitration provisions addressing fee disputes may be included in attorney engagement agreements. With regard to malpractice claims, Rule 1.8(h)(1) states that a lawyer shall not make an agreement prospectively limiting the lawyer's liability for malpractice unless the client is independently represented in making the agreement. Comment 14 to Rule 1.8 explains that this rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims provided such agreement is enforceable and the client is fully informed of the scope and effect of the agreement. Since exemplary damages are not available in arbitration, it remains unclear whether the client must be independently represented if the engagement agreement provides for arbitration of legal malpractice claims.

IV. Written Conflict Waivers in Engagement Agreements.

A. Differing viewpoints regarding advisability of including conflict consents/waivers in engagement agreements.

B. May be cleaner to have separate agreements.

C. Conflict waivers must be in writing and may validly waive only consentable conflicts. In appropriate cases, clients may even waive conflicts that may arise in the future, so long as the requirements of Rule 1.7(b) are met, and the client reasonably understands the material risks of the waiver. General, open-ended waivers or consents to future conflicts will not usually be effective. Rule 1.7, Comment 22.

D. A client who has consented to a conflict may revoke the consent at any time. Rule 1.7.