As a practical matter, legal ethics rules almost always require a writing concerning the lawyer-client relationship; these writings are usually in the form of an engagement letter. With engagement letters, a lawyer can confirm in writing with his or her client who is and who is not the client, the engagement’s scope, how the lawyer and legal expenses are to be paid, and other matters shaping the lawyer-client relationship. In addition to probably being an ethical violation, not confirming most of these issues in writing could be worse than embarrassing.

I. The Model Rules

Generally, the rules of professional conduct for lawyers are state law, including the law governing lawyer-client relationships and thus engagement letters. All states except California have adopted a version of the ABA Model Rules.1 For engagement letter issues, check the relevant state’s law, which is almost always its version of Model Rule 1.5, but in a small minority of states includes statutes or court rules, especially as to fee agreements.

Under Model Rule 1.5(b), a lawyer must communicate to the client the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible. This communication would be “preferably in writing, before or within a reasonable time after commencing the representation . . . .” Under Model Rule 1.5(e), a lawyer must have a written fee agreement signed by the client for contingency fee matters. Under Model Rule 1.5(e), to divide a fee, lawyers not in the same firm must have the client agree in writing.

II. Engagement Letter Terms

To comply with legal ethics requirements, lawyers are almost always required to give a writing to a client, which can become the agreement for the lawyer-client relationship; the term used here for such a writing is engagement letter. An engagement letter should include standard terms that are required by ethics rules, standard terms that the lawyer wants to apply to lawyer-client relationships, and terms specific to the representation at issue. Often these three types of terms overlap. For some issues, as discussed below, the client needs to sign the engagement letter.

A. Identify the Client

An engagement letter should identify the client(s). Among the clients an employee benefits lawyer might be asked to represent are the employee benefit plan, the plan sponsor, the plan

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1 For California statutory provisions requiring a lawyer to have a written fee agreement, see Cal. Bus. & Prof. Code §§6147 & 6148.
administrator, any other plan fiduciaries, and plan participants. For employee benefits lawyers, who is not the client will often need to be spelled out in the engagement letter. A separate “I’m not your lawyer” letter to a non-client might be appropriate.

In Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., 1994 WL 62124, 1994 U.S. Dist. LEXIS 2154 (D.N.J. Feb. 23, 1994) (unreported), the lawyer was disqualified because the trustee reasonably misunderstood and thought the lawyer was representing her as well as the plan. The lawyer testified that he advised the trustee that she was not the client, but no engagement letter memorialized this advice. In Schiffli, addressing who was and was not the client in an engagement letter could have avoided the disqualification. More so, a “I’m not your lawyer” letter to the trustee should have avoided the many problems caused by the trustee’s misunderstanding.

In Employee Benefits Law (4th ed. 2017), Chapter 20, III. Multiple Representation, possible conflict of interest issues and confidentiality issues from a lawyer representing more than one client are discussed for about a dozen pages. For example, a plan and a plan sponsor are often adverse if a plan funding dispute arises. If a lawyer is considering representing multiple clients, he or she should consider referring to Chapter 20 to help draft the engagement letter.

Many times, concurrent conflicts from multiple representation can be recognized and waived. The Commentary to Model Rule 1.7 outlines a four-step process: (1) identify the potential clients, (2) determine whether a conflict exists, (3) determine whether the potential clients can consent to the conflict, and (4) either obtain the consent or decline the representation. A description of the conflicts and the waiver need to be in an engagement letter signed by each of the clients.

An example, using the case description from Chapter 20, V.A.4.a.ii, Ethics (footnotes omitted), of the problems from not having a waiver, is helpful:

In Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., the court permitted disclosure to plan participants of communications between the plan fiduciaries and counsel because “when an attorney advises a fiduciary about a matter dealing with the administration of an employees’ benefit plan, the attorney’s client is not the fiduciary personally but, rather, the trust’s beneficiaries.” The plan participants in that case had alleged that the plan, its trustees, and the employer had illegally amended the trust agreement to provide for a reversion of surplus assets to the employer, rather than to the participants. In support of their claim, the participants relied on an affidavit of former legal counsel to the plan. The defendant fiduciaries claimed that the affidavit was privileged, because the attorney worked for the outside general counsel to the plan sponsor and provided legal services to the plan, related trusts, and the plan sponsor, without any separation of services between these various activities. The court rejected the claim, finding that, as the true clients of the firm, the participants had a right to the information, even without a showing of good cause.

In *Washington Star*, lawyers who appear to have thought they were only representing the plan fiduciaries had the plan participants indirectly as their true clients.

Yet, plan fiduciaries with issues potentially adverse to plan participants should have access to legal advice that is privileged with the fiduciary as the sole client. An engagement letter should clearly describe such circumstances.

An initial issue beyond what can be fully discussed here is whether employee benefit plans are an independent legal person, different than the plan sponsor. On this issue, the law is not only obtuse, but the federal circuits have conflicting lines of authority. An additional issue is who controls the employee benefit plan for purposes of who can engage a lawyer or provide conflict waivers. For pension plans, is the plan sponsor or the plan administrator, if different entities, the proper party to act for the plan? Hopefully, the plan documents provide guidance. For fully insured welfare benefit plans, is the insurer also the plan and thus the proper party? For engagement letters, this issue can often be finessed by an arrangement that does not resolve it but makes it not relevant. Regardless, when drafting an engagement letter, whether the plan is an independent legal person is an issue that should be considered.

**B. Multiple Representation**

A lawyer having an engagement letter signed by all jointly represented clients is crucial for multiple representation. The following are among the issues to address in the engagement letter for multiple clients: (1) whether, when and how to share confidential information among co-clients, (2) how to divide fees and expenses, (3) how to make decisions that require client involvement, (4) the possibility of the lawyer’s having to withdraw from representing some clients or all clients, and (5) any existing conflicts, possible future conflicts, and waivers of conflicts.

As to how the co-clients make decisions that require client participation, an example might be helpful. A lawyer might represent the employer and individual employees in the same lawsuit. Who decides whether to settle? Who pays for the defense? What difference does it make if a liability insurer is providing a defense and possible indemnification? Such issues require thought and should be carefully described in an engagement letter signed by the clients involved.

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3. *See* ABA Formal Op. 94-380 (addressing “the circumstances of a lawyer who has undertaken to represent only the fiduciary, and not the beneficiaries of the estate or trust for which the fiduciary has responsibility.”); Chap. 20, IV.B.1 (discussing duty of confidentiality where the fiduciary is the sole client).

An engagement letter might also address how any judgment or settlement would be funded or distributed. If the parties cannot agree at the beginning of the representation how to fund or distribute a judgment or settlement, that could be helpful to the lawyer to know before accepting the engagement.

Under Model Rule 1.4 and with joint representation, the default is that all material confidential information should be shared with each client. ABA Formal Opinion 06-438 (Feb. 10, 2006) recommends that lawyers obtain each client’s express consent to share confidential information within the client group at the outset of the representation.

In *Unnamed Att’y v. Ky. Bar Ass’n*, 186 S.W.3d 741, 743-44 (Ky. 2006), a husband and wife retained a lawyer to investigate the murder of the wife’s former husband. The lawyer advised the husband and wife that conflicts could arise and he might have to withdraw. The lawyer’s investigation revealed that one of them had been directly involved in the shooting, without the other’s knowledge -- awkward. The lawyer was reprimanded for not explaining that the joint representation, without agreement otherwise, required the sharing of all information to each client. Similarly, without an engagement letter providing otherwise, an employee benefits lawyer could have an awkward situation. For example, the lawyer may represent fiduciaries with a duty to inform participants as well as fiduciaries of matters such as prior fiduciary or co-fiduciary misconduct.

Other agreements as to confidential information are possible and could comply with Model Rule 1.7. For example, an employer may have the same lawyer also defend employees, but not want all of the employees to have access to confidential information that an employee would not otherwise have access to, such as executive compensation details. The type of information and informed consent should be carefully described in an engagement letter signed by the party not having access to the information.

### C. Limit the Scope of the Engagement

Under Model Rule 1.5(b), a lawyer must communicate to the client the scope of the representation. Under Model Rule 1.2(c), a “lawyer may “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Some state versions of Rule 1.2 explicitly require written consent to such scope limitations. Again, as a practical matter, limits to the scope of representation should be in the engagement letter.5

If a client tells a lawyer not to do something that might arguably be considered part of the legal work, the lawyer should document those instructions in the engagement letter, preferably with the client’s signature. For example, a client might tell a lawyer that the accountants will handle tax aspects of a deal. In *Genesis Merch. Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*, 2018 WL 358068 (Jan. 11, 2018), the court denied summary judgment as to a defense argument that oral conversations and extraneous documents established limited scope of representation, because the engagement letter did not limit the scope of the representation.

5 ABA Formal Opinion 472 (Nov. 20, 2015) advises “lawyers providing limited-scope representation [to] confirm the scope of the representation in writing provided to the client.”
As discussed in Chapter 20.I.B, employee benefits lawyers should consider whether they have an ethical obligation to update clients about the frequent changes in employee benefits law. In general, a lawyer is not expected to give advice until asked by the client. Frequent unsolicited updates on employee benefits law changes may lead to an argument that a lawyer has impliedly taken on a duty to update. This issue can be addressed in an engagement letter.

A lawyer who serves as local or special counsel in a matter has risks that can be managed by clearly describing in the engagement letter the lawyer’s role limited role and relationship with lead counsel. See New York City Opinion 2015-4 (June 2015) (additional guidance on these issues).

Courts have enforced engagement letters limiting the scope of representation. For example, in AmBase Corp. v. Davis Polk & Wardwell, 866 N.E.2d 1033, 1037 (N.Y. 2007), the court relied on the engagement letter to hold that the lawyers had successfully litigated the IRS tax dispute for the client and did not commit malpractice by failing to advise the client that its parent corporation might be primarily liable for the taxes. The engagement letter specified that the firm represented the client “to resolve the tax issues currently before” the IRS. The court concluded that this “plain language” showed that client had not retained the firm to “determine whether the tax liability could be allocated to another entity.”

But at times engagement letters limiting the scope of representation are not enforced. In Keef v. Widuch, 747 N.E.2d 992 (Ill. App. Ct. 2001), the court reversed the dismissal of a complaint against a lawyer who had been retained solely to handle a Workers’ Compensation Act claim. Allegedly, the lawyer had failed to advise the plaintiff of potential claims against third parties. The court held that some duties to so advise could be implied, even against the scope-limiting language in the engagement letter. *Id.* at 997-98.

**D. Consent to Conflicts**

Under Model Rule 1.7(b)(1-3), a lawyer cannot represent clients with a concurrent conflict of interest if (1) the lawyer would not be able to provide competent and diligent representation to each affected client, (2) the lawyer is prohibited by law from the joint representation, or (3) one client has a claim against another client in the same litigation.

Under Model Rule 1.7(b)(4), a lawyer otherwise can represent clients with a concurrent conflict of interest if the lawyer has, confirmed in writing, “informed consent” from each client waiving the conflict. Some states require that the consent and waiver be signed by each affected client. As a practical matter, clients with a waivable conflict should each sign an engagement letter that describes the conflict and the waiver.

Many engagement letters include advance consents or waivers of conflicts. Giving an advance conflict waiver with “informed consent” will be difficult for many types of conflicts. For an expected type of possible future conflict, though, describing the type of conflict in the engagement letter would make sense and should be enforceable.

**E. Paying Fees and Expenses**
Under Model Rule 1.5(b), a lawyer must communicate to the client the basis or rate of the fee and expenses for which the client will be responsible, “preferably in writing, before or within a reasonable time after commencing the representation.” If the lawyer regularly represents the client on the same basis or rate, this requirement does not apply. Any changes in the fee agreement must also be communicated to the client.6 Some states require a lawyer to communicate the basis or rate of the fee to a new client in writing. As a practical matter, a lawyer in any state should communicate these matters to the client in the engagement letter.

Additional issues to consider describing in an engagement letter include the amount of any retainers and how retainers are to be treated, handling of client funds (deposit in a trust account), third party liens (subrogation and reimbursement claims), and litigation funding by third parties.

F. Client Responsibilities

A lawyer should consider what client responsibilities to include in the engagement letter: (1) to be truthful and provide all available information, (2) if litigation or if litigation is anticipated, to preserve evidence, including electronically stored information, (3) if litigation and the lawyer is not handling, to put insurers on notice, (4) to cooperate and be available when needed, (5) to update promptly changes in contact information, and (5) to inform the lawyer of any changes that could affect the representation.

G. Possible Disputes

Additional issues that might be in an engagement letter include those that related to a possible dispute between the lawyer and the client. Choice of law, arbitration, jury waiver and venue are examples. A lawyer may decide that raising possible future disputes in an engagement letter is not worthwhile.

H. Termination and File Retention

While a client generally may terminate at will the lawyer, an engagement letter should address when and how the representation can be terminated by the lawyer. It might also require how the client gives termination notice to the lawyer. An engagement letter should include what duties the lawyer and the client have following termination. A lawyer will want to spell out the client’s responsibilities to pay the lawyer even after termination. A lawyer should consider including in an engagement letter when the representation might end. For examples, the representation might end when an invoice marked “Final Invoice” is sent or after a specified period of no activity and no further services were contemplated.

An engagement letter might put the client on notice that the lawyer does not retain files after a certain number of years. Some states require that a lawyer notify a client of the lawyer’s

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6 For a discussion of ethical concerns when changing a fee agreement, see ABA Formal Op. 11-458 (Aug. 4, 2011). Under Model Rule 1.8(a), changes in a fee agreement may require notice to the client that he should seek independent legal advice. See In re Curry, 16 So. 3d 1139 (La. 2009) (upholding three-month suspension of lawyers for changing from one third contingency to fee agreement that allowed lawyers to recover even if no recovery).
document retention policies. Addressing these issues in the engagement letter should avoid awkward circumstances with old files.

I. Matter-Specific Engagement Terms

A lawyer needs to recognize that developing a robust form engagement letter is helpful. The California Bar even publishes sample fee agreements and optional “clauses and disclosures.” Other states have sample forms. If a client is not willing to agree to a robust engagement letter, perhaps the lawyer should think again about whether to represent the client.

But each engagement may have unique circumstances that should be considered and, if appropriate, edited into an appropriate form engagement letter. At times, the most important parts of an engagement letter are those unique to that matter. The use of a form should not substitute for careful thinking of the risks addressed by a specific representation and its engagement letter.

III. Conclusion

For any lawyer, not having an adequate engagement letter can lead to problems, including ethics violations, not recovering contingent fees, and malpractice claims. For an employee benefits lawyer, the problems and risks are increased by common multiple representations and the ambiguities posed by the plan as a separate legal person. An engagement letter can help manage these additional problems and risks.