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REENGAGING WITH ENGAGEMENT LETTERS

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Background and Introduction

Unlike many of the practicing attorneys in Knoxville, Tennessee, I did not go to law school in my home state. When I graduated from The University of North Carolina School of Law in 1976, finding a job as a female attorney became the first genuine work-related challenge of my young life. Due to a brief stint in federal government before law school, I had "reinstatement rights," and landed a job working for the Infernal Revenue Service (where I intended to remain for about five years and wound up working for ten); my primary position was Estate and Gift Tax Attorney. (Try making friends and influencing people as an IRS agent!)

I left for private practice with a medium-sized group in Knoxville, then opened my own firm in 1992. Thanks in part to many of the marketing ideas and techniques I picked up along the way, and particularly from the National Speakers Association, I became an ACTEC fellow with a successful (but rarely sophisticated) practice, not just in estate planning, but more and more in trust and estate administration as well. My goal is to pass on to you a few of the experiences, best ideas and suggestions that I have accumulated over the years in the necessary process of engaging with attorney/client engagement letters.

A. Treasure Trove of Recommended Resources on Engagement Letters

- The ACTEC Commentaries on the Model Rules of Professional Conduct — Sixth Edition 2023
- Engagement Letters: A Guide for Practitioners — Third Edition, 2017 "For use with the ACTEC Commentaries on the Model Rules of Professional Conduct, Fifth Edition 2016" — Online Version Edited March 2020
- Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship — A CNA Professional Counsel Guide for Lawyers and Law Firms — 2018

- Attorney-Client Agreements Toolkit, a risk management practice guide of Lawyers Mutual Liability Insurance Company of North Carolina — Updated September 2017
- Joint Representation in Complex Estate Plans: Avoiding Ethical Traps; and Surviving the Morass of Ethical Problems in Representing Multiple Clients in Complex Planning — May 2022 Webcast presented by Charles D. ("Skip") Fox, IV, J. Lee E. Osborne, Professor Mary F. Radford and Bruce M. Stone
- Supplemental Checklist and Form of an Engagement Letter for Joint Representation of Spouses in Estate Planning Matters, submitted by J. Lee Osborne
- ACTEC — Heartland of America Fellows Institute Kansas City Program: Engagement Agreements: An Attorney's Ethical Responsibility — November 30, 2018

B. <u>Everything Begins with the Model Rules of Professional Conduct</u>

Southeast Fellows' Jurisdictions' Adoption of Model Rules of Professional Conduct:

1.	**North Carolina**	**10/7/1985**
2.	**West Virginia**	**6/30/1988**
3.	**South Carolina**	**1/9/1990**
4.	**Virginia**	**1/25/1999**
5.	**Georgia**	**6/12/2000**
6.	**Tennessee**	**8/27/2002**

MRPC 1.0: Terminology

"If the MRPC require a lawyer to obtain a client's informed consent, confirmed in writing, the lawyer should at the outset provide the client with information sufficient to allow the client to understand the matter. At that point the client may give informed consent regarding the matter. For purposes of MRPC-1.0, it is sufficient if the consent is confirmed in a writing sent by the client to the lawyer or by the lawyer to the client."

— (From ACTEC Commentary on MRPC 1.0)

MRPC 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MRPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. […]

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent. […]

MRPC 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

MRPC 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decisions or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(c) is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; and […]

MRPC 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor require, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of this particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged I the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and the ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any change sin the basis or rate of the fee or expenses shall also be communicated to the client. […]

MRPC 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)

[…]

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

MRPC 1.7: Conflict of Interest: Current Clients

MRPC 1.8: Conflict of interest: Current Clients: Specific Rules

MRPC 1.9: Duties to Former Clients

MRPC 1.10: Imputation of Conflicts of Interest: General Rule

MRPC 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

[…]

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents […]

MRPC 1.14: Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian. […]

MRPC 1.15: Safekeeping Property: See, for example, Formal Ethics Opinion 2015-F-160 - Client Files (found at the end of the Appendix attached)

MRPC 1.16: Declining or Terminating Representation

MRPC 1.18: Duties to Prospective Client

MRPC 2.1: Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

MRPC 4.1: Truthfulness in Statements to Others

MRPC 4.3: Dealing with Unrepresented Person

MRPC 5.3: Responsibilities Regarding Nonlawyer Assistance: With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer, and […]

MRPC 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

MRPC 7.1: Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

C. Analysis of a Few Selected Cases

1. ***Lazy Seven Coal Sales v. Stone & Hinds, 813 S.W. 2d 400 (1991)***: Sam Cox ("Cox"), the president and 51% shareholder of Lazy Seven Coal Sales, Inc. ("Lazy Seven"), engaged the law firm of Stone & Hinds, PC ("Stone & Hinds"), to serve as legal counsel for the corporation in 1980. The only other (49%) shareholder was Frank Mehler ("Mehler"), who provided most of the capital for the company. Stone & Hinds drafted a stockholders' agreement, bylaws for the company and an employment agreement between the entity and Cox as its president, but none of the documents were signed because the two shareholders could not agree on their terms. Pursuant to Mehler's request, Stone & Hinds also prepared a family voting trust for Mehler and his family, all of whom signed that agreement.

In April of 1981, Mehler appeared at the corporate offices, threatened employees with termination and generally disrupted the normal functions of the company because he believed it was being operated improperly. Acting as corporate counsel, Stone & Hinds recommended to Cox that he attempt to reach a compromise with Mehler, but as its president, Cox directed the law firm to file a complaint and request for a temporary restraining order. The order was entered, and Mehler chose to defy it, directing the company's banks to stop all further payments from corporate monies. Mehler (represented by counsel) was held in contempt of court, whereupon he sought the dissolution of the company with the appointment of a receiver and eventual distribution of its assets. After the court determined Cox and Mehler to be "bitterly hostile," and the corporation to be insolvent, Stone & Hinds prepared and filed a bankruptcy petition on behalf of Lazy Seven, requesting a Chapter 11 reorganization. At that point Mehler offered to buy the corporate assets for $10 and agreed to assume all the corporation's debts. During the dissolution process, Stone & Hinds filed a claim for $22,842.23 in legal fees, and, on behalf of a former salesman for the company, the law firm filed a claim against Lazy Seven for sales commissions. About one year later, Mehler filed a legal malpractice

complaint against Stone & Hinds, and a jury trial ended with a verdict of $2.6 million in favor of Mehler against Stone & Hinds, together with $6,000 for Stone & Hinds against Mehler.

In his cause of action against Stone & Hinds, Mehler argued that the Code of Professional Responsibility ("the Code") sets the standard of care in an action for legal malpractice, and an attorney's violation of the Code establishes sufficient basis for liability. Mehler's primary expert witness was Hofstra, Harvard and Georgetown law professor/lecturer Monroe H. Freedman. His testimony included the following explanation: "…the conflict of interest notion itself is appearance of impropriety. You are not saying when you talk about a conflict of interest or you're talking about an appearance of impropriety, you are not saying we know that this lawyer, in fact, did something wrong. What you are saying is it looks bad. And even though the lawyer may not have done anything wrong, in fact, even though we assume the lawyer did not do anything wrong, we are not going to permit it to look that way." **[!]**

In rejecting the plaintiff's argument that, despite the absence of proof of causation between the conduct of an attorney and a claim of damages by the client, liability can nevertheless be imposed upon the lawyer, the Court found as follows: "Professor Freedman's conclusion that there need be no proof of causation to establish civil liability cannot be accepted. His rationale itself demonstrates why the Code cannot be the standard. Even though the appearance of impropriety may be the basis for disciplinary proceedings against the lawyer, and perhaps the basis for disqualification in a legal proceeding, it cannot be the basis for civil liability without proof of a causal connection between a lawyer's conduct and any claimed damages. The lawyer, to use Freedman's words, 'who did not do anything wrong' cannot be held liable only because 'it looks bad,' and the conclusive presumption of shared confidences cannot be substituted for a causal connection between the acts of the lawyer and the alleged damages is totally absent."

The Court of Appeals' opinion in *Lazy Seven* had concluded that Mehler's failure to act to disqualify Stone & Hinds "at the first opportunity constituted a waiver of any claim based on conflict of interests." Quoting with approval the lower Court's opinion, the Tennessee Supreme Court repeated that "when a party has full knowledge of the facts giving rise to a conflict of interest, that party must move for the disqualification of the attorney or waive any tort claim against the attorney arising out of such conflict." The opinion continues that "a party is required to move that his former lawyer be disqualified as soon as he is aware of the conflict, provided the motion for disqualification or the granting thereof would not place the former client at an unfair disadvantage. … The client cannot hold the right in reserve for tactical purposes until it would be most helpful to his position. Failure to move for disqualification at the earliest practical opportunity will constitute a waiver."

2. ***Allegrino v. Ruskin Moscou Faltischek, PC, Not Reported in Fed. Rptr. (2021); 2021 WL 5500084.***: The case summary begins inauspiciously for the plaintiff: "Anthony J. Allegrino II, a disbarred attorney proceeding pro se, sued the law firm Ruskin Moscou Faltischek, PC (RMF) and its attorney, John G. Farinacci, as well as [two other lawyers in the firm] for legal malpractice, alleging that they failed to properly represent him in a probate proceeding"… Allegrino maintained that he was the only beneficiary of an estate pursuant to the provisions of a 2006 will which was never properly submitted to the Surrogate Court for probate. Mr. Allegrino signed two separate retainer agreements with RMF in the course of the firm's work on his behalf, and both agreements "specifically provided that RMF and Farinacci would represent Allegrino only with respect to the appeal of the probate proceeding to the Appellate Division. Neither agreement provided for representation in the underlying probate proceeding." In the first retainer letter, RMF committed "only to evaluate the possible merits of an appeal; the firm did not agree to pursue the appeal." In the second letter of engagement, RMF agreed "to represent Allegrino in the Appellate Division appeal only and explicitly stated

that the representation did not include 'any proceedings in the Surrogate's Court' related to the 2006 will."

The Court determined that "The allegations and evidence presented here do not show that Allegrino, RMF, and Farinacci had a meeting of the minds with respect to representing Allegrino in the probate proceeding." [There was a handwritten amendment to the engagement letter which the Court disregarded because it "demonstrates only that Allegrino wrote on the document. It does not contain any initialing or a signature showing that a representative from RMF agreed to the change."]

When faced with the argument that the attorneys were never engaged to represent him in the probate proceeding, Allegrino responded "that the probate proceeding was straightforward and that the will 'should have sailed right through without hurdles.'" The Court dismissed this argument, noting that "… to show that the will's execution was valid, Allegrino would have needed to show that the decedent's signature on the 2006 will was genuine—and thereby overcome a report from a forensic handwriting expert that stated it was 'highly probable' that the signature was not genuine—and convince two witnesses to recant their deposition testimony [in which they admitted they could not remember whether the decedent acknowledged the document to be his will or not]. [The reasons for Allegrino's disbarment become more and more apparent as one reviews the opinion in this case!]

There is a very interesting (but not at all scholarly) article related to the death and probate proceedings for Roman Blum, a Staten Island Holocaust survivor who purportedly left a $40 million estate in 2013; the article appears to shed more light on the character (or lack thereof) of a certain Mr. Allegrino, along with a picture of him leaving the Surrogate Court after the Judge dismissed his case. Check this out: https://www.silive.com/news/2016/03/post_1368.html

3. ***Kincaid v. Johnson, True & Guarnieri, LLP 538 S.W.3d 901, Ky Court of Appeals***: "This appeal concerns the amount of attorney fees awarded to … [the law firm of Johnson, True & Guarnieri, referred to in the opinion as "JTG"], and the manner in which those fees were calculated." The decedent, Garvice D. Kincaid, died in 1975 survived by wife Nelle, daughters Joan and Jane (the "Kincaid Daughters"), and two grandsons (the "Kincaid Brothers). The estate was divided into a "marital share" [which held Funds A and B] and a "non-marital share" [holding Fund C]. Central Bank & Trust served as Trustee and an "Advisory Committee" was created to assist the Bank in its Trustee role. The Kincaid Daughters were the beneficiaries of Funds A and B, and the Kincaid Daughters, the Brothers and their issue were the beneficiaries of Fund C.

Just before the close of 2005, the Kincaid Daughters, along with the Advisory Committee, "filed a motion in Fayette Circuit Court for approval of a proposed final allocation and distribution of trust assets among Funds A, B, and C," at which point the Kincaid Brothers hired JTG to oppose the reallocation plan. JTG had represented the Brothers in the past in connection with Fund C, during which period JTG billed the Brothers on an hourly basis, from January of 2006 to June of 2007. A settlement among the parties was reached in December of 2007, under the terms of which the amount to be held in Fund C would be about $30 million more than the Fund would have retained under the terms of the original reallocation plan. $2 million of these funds was to be paid for the estate's final administrative expenses. The Kincaid Brothers were together entitled to receive $8 million in cash over the following four years under the settlement. In seeking payment of attorneys' fees from Fund C (as contemplated under the terms of the settlement), JTG filed a motion seeking fees in the amount of $2.8 million, asserting that Fund C obtained a $28 million benefit from their representation [thus attempting to charge a fee based upon 10% of the additional funds eventually allocated to Fund C]. Everyone else objected.

In the course of the litigation, the Kincaid Brothers produced a document, referred to by the Court as the "Engagement Letter," dated January 6, 2006, written by JTG and sent to the Brothers one week after their initial meeting with JTG, in which the law firm professed to be "more than happy to represent [the Kincaid Brothers] and Kevin's children in this important matter." The following provision of the letter was quoted verbatim by the Court:

"I do want to clarify one point, however, in order to avoid any confusion or disputes in the future. This may be a substantial undertaking. Obviously, the reasonableness of the proposal to be made by the Advisory Committee may govern the complexity and duration of this litigation. If, however, the two of you want to oppose any allocation of Fund C assets to Funds A and B, we will be in for a complex, difficult and time-consuming fight …. . **This firm will bill for services rendered at our regularly** [sic] **hourly rates on a monthly basis and will ask that our fees be paid in a timely fashion.** We certainly have no objection to petitioning the Court for the reimbursement of your fees from the trust at the conclusion of this matter, but we do not want to be in the position where we are expected to wait until the conclusion of the litigation to be paid and risk the Court not requiring the trust to pay your fees. (Emphasis added [by the Court in its written opinion])."

The law firm sent invoices regularly, and months after the Engagement Letter was sent, JTG followed up with another letter, dated in February of 2007, stating that the law firm would no longer draw from the escrow account to cover the balance of the Brothers' account. The following statements were also included in that letter: "I am willing to ride with the two of you for a while concerning these bills. It would be appreciated if you could make some fairly substantial partial payment on these monthly bills as we move through this process. I am not going to insist on full payment. …. Quite frankly, it is my plan to make a very substantial fee petition at the end of this case. To be completely candid, I believe that the complexity of this case, the amount of time and attention I am having to devote to

this matter, and numerous other combined factors, would justify a fee well above an hourly rate."

JTG continued to bill on an hourly basis for the next six months, through June of 2007, changing the hourly rate from $250 to $275 in January. In an accompanying letter to the June invoice, they indicated that the amount of fees they would "petition the Court for would depend upon the nature and amount of recovery." After July of 2007, they submitted no more invoices. JTG's arguments to support a much larger fee were that the Brothers never paid in full or on time; that "there was never a meeting of the minds between the parties" concerning their fee arrangement; that "the Engagement Letter was an offer from JTG, but that this offer was never accepted by the Kincaid Brothers, as [they] never made a full payment based on the hourly-rate amount they were charged." When one of the Brothers was asked about the Engagement Letter, "he stated that in the previous litigation JTG had billed him and his brother on an hourly-rate basis, and that, based on the Engagement Letter, he assumed that they would continue this payment arrangement."

The Court's conclusion was, not surprisingly, that there was indeed an hourly-rate fee agreement: "Contrary to JTG assertions, we do not view the Engagement Letter as JTG's offer to the Kincaid Brothers to form a contract. At the time the Engagement Letter was executed, JTG had already begun work on its representation of the Kincaid Brothers in this Matter. The Engagement Letter memorializes JTG's agreement and acceptance to represent the Kincaid Brothers based on the terms discussed in their meeting on December 29, 2005. This attorney fee contract is not only evidenced by the Engagement Letter; it is evidence by the fact that JTG continually worked on the case and sent the Kincaid Brothers monthly statements, reflecting the hourly-rate fee, for eighteen months and that payments were received from the Kincaid Brothers and accepted by JTG."

The Court rejected JTG's assertion that there was a modification of the contract with the Kincaid Brothers, citing ABA Formal Op. 11-458 (2011): "Contracts ordinarily may be modified by mutual consent of the parties, provided they follow the appropriate formalities. Even with client consent, however, modifications of existing fee agreements are usually suspect because of the fiduciary nature of the client-lawyer relationship."

4. ***APR Energy Holdings Ltd. V. Deloitte Tax LLP et al.*** **209 A.D.3d 402 (2022).**: This is a case in which an accounting firm was sued in the amount of $500 million for malpractice and deceptive trade practices. Based upon engagement letters executed during the period from January of 2012 through April 2013 between the accounting firm (Deloitte Tax) and a former client (APR Energy Holdings), the Court determined that the action was time-barred based upon the engagement letters' provision that "No action, regardless of form, relating to this engagement letter … or the Services may be brought … more than one year after the cause of action has accrued." [This provision shortened the limitations period from the standard of three years down to one.] New York law provided that claims for malpractice accrue at the time the professional advice is given.

The facts were that Deloitte Tax provided advice to billionaire William Davidson beginning in 2008 in connection with the update of his estate planning, and the firm worked with him until just before he died in March of 2009. The accounting firm was then hired to help with the administration of the Davidson Estate; IRS stepped in and audited the Estate's tax returns, initially maintaining that the Estate owed billions of dollars more than was reported. Deloitte continued to represent the Estate until the IRS settled the audit for about $500 million in July of 2015. In September of that year, the Estate brought the instant action against Deloitte for malpractice. The facts of the case demonstrated that Deloitte's advice in connection with the Estate's issues was given in 2013 and 2014, and the Court determined that any alleged malpractice-related advice was given no later than the end of 2014. The limitations provision in the engagement letters was thus

reduced to one year thereafter, so the deadline for the filing of any action for malpractice fell no later than the end of 2015. Plaintiffs did not sue until 2019. The Court rejected the plaintiff's arguments based on estoppel and on the doctrine of continuous representation, holding that equitable estoppel is an "extraordinary remedy" requiring that the plaintiffs prove actions of the defendant in some way prevented them from filing suit, and that the continuous representation doctrine is not available in a situation in which the limitations period is contractual and reasonable. All claims were held to be barred by the contractual statute of limitations found in the engagement letters.

5. ***Cohen v. Jaffe Raitt Heuer and Weiss, PC, 768 Fed.Appx. 400 (2019).***: The following comment appears at the beginning of the Judge's opinion in this case: "Neal Cohen and Darren Chaffee [plaintiffs] wanted to structure a deal in a way that would avoid millions in legal liability. So they sought legal advice from the [defendant] law firm Jaffee, Raitt, Heuer and Weiss, P.C. ("Jaffe"). Turns out, Jaffe gave them bad advice, and Cohen, Chaffee, and one of the companies they own (SSL Assets, Inc.)) ended up on the hook for several million dollars. All three sued Jaffe for legal malpractice and won, but the jury awarded them less in damages than they wanted. While both sides appeal, we affirm."

The Court's fact summary explains: "Neal Cohen and Darren Chaffee buy and sell distressed businesses. While investigating the possible purchase of LSI Corporation of America, Inc. ("LSI"), Cohen and Chaffee discovered that LSI had a potential liability: its underfunded pension plan. . . . Although they understood this risk 'pretty well,' neither Cohen nor Chaffee is a lawyer, so they sought out legal advice from Jaffee. . . . In his email to one of Jaffee's partners, Jeffrey Weiss, Chaffee wrote that '[o]ne of the big issues in [the LSI] deal' was its 'multi-employer pension plan.' … Chaffee requested legal advice, saying '[w]e also want to be sure that we aren't personally liable or put our other assets/companies at risk' . . .Jaffe never sent a written engagement letter setting out exactly whom the firm represented. And Weiss never discussed with Cohen or Chaffee the

companies that the two own or manage. Nevertheless, the firm came up with a corporate structure that Weiss told Cohen and Chaffee would save them from pension liability. But Weiss was wrong. … the company's pension liabilities spread to SSL . . . Cohen, Chaffee, and SSL sued Jaffe and its lawyers for legal malpractice. … a key question emerged: who exactly had Jaffe been representing? . . . During a four-day trial, the jury heard conflicting evidence on SSL's representation. Ultimately, the jury found that Jaffe had both represented SSL and committed legal malpractice."

The defendant law firm maintained that the evidence was not sufficient to prove that it had an attorney-client relationship with SSL, arguing that in the absence of such a relationship the firm could not be held liable for malpractice. . . . "Cohen and Chaffee testified that they sought advice for both themselves and their companies, including SSL. . . . They pointed to Chaffee's email to Jaffe about 'other assets/companies' as conclusive proof that they intended for Jaffe to represent SSL. … Weiss—one of Jaffe's own attorneys—specifically admitted on cross-examination that he 'owed a duty of care to Mr. Cohen and Mr. Chaffee *and their other assets and companies.*' . . . Weiss said that 'duty of care' meant that he would 'look out for their interest, and do what is reasonable and appropriate under the circumstances.' . . . Cohen and Chaffee presented evidence that Jaffe actually provided them the requested (if erroneous) advice on avoiding liability for those companies."

On behalf of his law firm, attorney Weiss "said that Jaffe did not represent SSL because it did not know about SSL. Jaffe presented its own expert who testified that Chaffee's initial email merely set out 'the task' but did not define the scope of the attorney-client relationship. . . ."

The Court placed the issue in the hands of the jury because "When there are two reasonable stories about the claimed attorney-client relationship and neither is blatantly contradicted by the record, a genuine dispute about the facts exists. …

As a result, the jury gets to decide—not the court. And here, the jury did." In response to the law firm's argument that the attorney-client relationship requires mutual consent, the Court explained that "in every case where the existence of an attorney-client relationship is in dispute, one side will say a relationship existed, while the other will say it did not. … So the ultimate decision comes down to the fact-finder in evaluating the credibility of the witnesses and the evidence. … Here, Chaffee and Cohen's testimony, the email, the expert testimony, the work on common control group liability that necessarily required analysis of other companies, and Weiss's own statement about his duty of care were enough for the jury to infer an attorney-client relationship." The verdict in this case was based on the jury's conclusion that the plaintiffs suffered $6.3 million in damages, but also that the plaintiffs "failed to mitigate these damages" and so awarded them [only a mere] $1.7 million."

Warren Averett, LLC v. Landcastle Acquisition Corporation, 349 Ga.App. 479, Court of Appeals of Georgia; March 13, 2019: This is the very best "Road Map" case I've found for specific guidance on how to put together a good engagement letter! Averett, an accounting firm, was hired by Morris Hardwick Schneider, PC (MHS), "a large multi-state law firm that conducted real estate closings and other mortgage-related services. As a result of the nature and size of its business, MHS had 'billions of dollars flowing in and out of its [title] escrow accounts[,]' as well as 'millions of dollars flowing in and out' of its trust accounts [during the period at issue, which was from 2010 through 2014]."

"In December of 2012, the managing partner of MHS . . . hired the accounting firm . . . to conduct an audit for the prior three years. [The accounting firm] drafted an engagement letter that memorialized the scope of the audit and the terms of its contract…". The stated objective of the audit was to enable the accounting firm to express 'an opinion about whether [MHS's] financial statements [were] fairly presented, in all material respects, in conformity with U.S. generally accepted accounting principles.'" In January of 2013 the original

accounting firm was acquired by another firm, and a follow up letter was mailed to confirm, from a "corporate official" of MHS, that the audit would still be subject to the original engagement; a confirmation was provided; and later a second engagement letter was signed by both parties. The accounting firm provided audit reports for several years, but the Court found that "none of the audit reports addressed or even acknowledged the assets, liabilities, or cash flows for MHS's trust or title escrow accounts."

Therein lay the problem: "In the summer of 2014, MHS discovered that [its] managing partner … had embezzled at least $20 million from MHS's trust and title escrow accounts." MHS also alleged that the managing partner "embezzled at least $11 million of that total after the [accounting firm] had issued its 2010/2011 Independent Auditors' Report on January 11, 2013.

"In January 2017, [the successor to MHS] filed suit against the [accounting firm] for breach of contract, professional negligence, and gross negligence, seeking at least $17.5 million in damages." Citing both of the prior engagement letters (2012 and 2013), the defendants maintained that their contracts "expressly limited the amount of damages that [MHS] could recover on any claim to the amount of professional fees MHS had paid to [the accounting firm], which totaled about $87,000."

The court noted that both contracts (each four pages long) included an "**Issue Resolution**" clause (bold heading in the original) at the bottom of the third page, as follows: " . . . Should you become dissatisfied with our services at any time, we ask that you bring your dissatisfaction to our attention promptly. If you remain dissatisfied, it is agreed that you will participate in non-binding mediation under the commercial mediation rules of the American Arbitration Association before you assert any claim. In any event, no claim shall be asserted in excess of the lesser of actual damages incurred or professional fees paid to us for the engagement."

The plaintiffs argued that the Issue Resolution provision ("the Provision") was "unenforceable as a matter of law because (1) it was not sufficiently prominent to provide notice; (2) it was ambiguous and insufficiently explicit as to whether it applied to the … claims for professional negligence and gross negligence; and (3) even if the Provision was otherwise enforceable, it was still invalid and unenforceable under Georgia law to the extent it purported to limit the amount of recoverable damages for the . . . gross negligence claim."

The Court confirmed: "Exculpatory clauses in Georgia are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence. Given this paramount public policy, courts exercise extreme caution in declaring a contract void as against public policy, and should do so only when the case if free from doubt and an injury to the public interest clearly appears.

Nevertheless, 'because exculpatory clauses may amount to an accord and satisfaction of future claims and waive substantial rights, they require a meeting of the minds on the subject matter and must be explicit, prominent, clear and unambiguous.' These are 'strict requirements for [the] enforceability of [an exculpatory] clause.'

Now here is the best part: the Court concludes that "In determining whether a limitation of liability clause or an exculpatory clause is sufficiently prominent, courts may consider a number of factors, including whether the clause is contained in a separate paragraph; whether the clause has a separate heading; and whether the clause is distinguished by features such as font size."

In criticizing the Provision at issue, the Court noted that it "is the same font size as that used throughout the entirety of the 2012 and 2013 Contracts, and the Provision is not capitalized, italicized, or set in bold type for emphasis. Further, the Provision is not set off in a separate section that specifically addressed

liability or recoverable damages, with a bold, underlined, capitalized, or italicized specific heading, such as '**Limitation of Liability**' or 'DAMAGES.' Nor is the Provision in a prominent place within the contracts to emphasize the importance of the Provision's limitation on recoverable damages, such as being adjacent to another similarly significant provision or being next to the parties' signature lines.

"Instead, the Provision is included in a section, generically entitled '**Issue Resolution**,' near the bottom of the third page. The single-sentence Provision appears at the very end of the section, which also contains several unrelated provisions regarding, inter alia, MHS's responsibility to compensate the [accounting firm] if it should be required to respond to court orders, subpoenas, etc., related to the audit and to reimburse [the accounting firm] for associated expenses; directing MHS to contact [the accounting firm] if it became dissatisfied with its services; and requiring MHS to participate in mediation to resolve any issues before it filed a claim against [the accounting firm]."

Therefore, Court held the Provision to be unenforceable as a matter of law.

D. Best Practices

- Talk about the letter in the first meeting, and cover the major points (see below), especially the "touchy" points.

- Develop a set of clauses from language you've seen and loved before to choose from and make the process much easier.

- Develop a simple checklist of points to cover in preparing the letter.

- Put the most important clauses of the letter in separate paragraphs; give each a separate bold face heading or distinguish each critical provision by font size,

capitalization, italics, underlining, etc. and don't stick them at the very bottom of the page or include them in other innocuous portions of the letter.

- Send the letter out as soon as possible after the conference.

- Give the client(s) a (preprinted) receipt when they pay for the initial conference, acknowledging they are paying for the initial conference, but confirming that no further obligation exists for either party until the engagement letter is signed by all parties.

- Bill regularly and hold up your end of the bargain.

- Consider preparing a nifty brochure with the truly "boilerplate" portions of the letter like one I received from a firm of 100+ attorneys.

- Call them on it when clients violate the terms of the deal by being rude or extremely late in payment or otherwise don't hold up their end of the bargain.

- Especially for litigation engagements, always build a way to GET OUT!!

- Remember Martin Seligman: Put on your pessimist hat and deliberately consider all the things that could possibly go wrong in the representation when you are thinking about what you ARE and what you are NOT doing in this engagement.