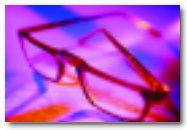

The Engagement Letter

An article published some years ago and written by a professor of legal ethics suggests that civil lawyers should consider giving a *Miranda*-type warning to their clients concerning the various exceptions to the confidentiality requirements that are such an ingrained component of the lawyer–client relationship.[1] These would include the requirement of reporting a client's intention to inflict substantial bodily harm[2] and the exception providing for disclosing client confidences to defend against a bar complaint or malpractice suit.[3]

The article is notable in several respects, namely that (a) the professor had probably never had the experience of dealing with the discomfort expressed by a client being presented with a 10-page engagement letter, and (b) it was written before the new exceptions to ER 1.6 that came as a surprise to many clients (and to quite a few lawyers) when first promulgated in 2003.

I am referring, of course, to the provisions of ER 1.6(b)(2) and (3) of the Arizona Rules of Professional Conduct, which now allow—and which in some instances may now require—a lawyer to reveal to third parties information the lawyer believes necessary to:

1. prevent the client from committing a crime or fraud reasonably certain to result in financial harm to someone and in furtherance of which the client has used or is using the lawyer's services; and
2. prevent, mitigate or rectify financial harm to someone that has or is about to result from her client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

The difference in the two subsections is that the first exception deals with a client who is in the process of perpetrating a crime or fraud but who has not yet hurt anybody, whereas the second exception deals with the situation in which the client has already used the lawyer's services to commit a crime or fraud and where the harm either has been done or is about to get worse.

"Bar Counsel Insider," insights from the State Bar's own Lawyer Regulation Department attorneys, is on p. 56.

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

David D. Dodge is a partner in the Phoenix law firm Dodge, Anderson, Mableson, Steiner, Jones & Horowitz, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

The point the professor makes is that our clients should know that if they insist on engaging in criminal or fraudulent conduct while using our services, we may have to disclose their transgressions to others in order to keep ourselves out of trouble. This forced breach of client confidentiality may come as a real surprise to many persons and firms who use a lawyer's services, the professor argues, and should therefore be required to be disclosed at the outset of the relationship by virtue of the requirements of ER 1.4 (Communication).[4]

There is not much uniformity about what should be disclosed to a client at the outset of the professional relationship, a fact manifested by the wide variety of engagement letters found in Arizona practice. Some engagement letters are so comprehensive they would take more time and intellect to read and understand than many clients possess.

What *has* to be disclosed to them, however, is quite clear and succinct: The client must be told, in a writing, the scope of the lawyer's engagement (*i.e.*, what you are going to do and, where appropriate, what you are not going to do) and the basis or rate of the fee and expenses for which the client will be responsible.[5] That is all that the ethical rules require.

Many lawyers like to have the client agree, in addition, that they will be allowed to withdraw from representing the client in litigation if their fees are not paid. And lawyers undertaking to represent a close corporation, a limited liability company, a partnership and the like should make it clear in writing who among the organization's constituents the lawyer is representing and, very importantly, who among them the lawyer is *not* representing. Lawyers undertaking the representation of two or more clients in the same matter should also have a provision, signed by the clients, about what happens if a conflict between the clients arises later in the representation and the lawyer wants to continue to represent one of them. Other than that, lawyers will continue to use provisions in engagement letters as they see fit.

Do we now need to include a "*Miranda* warning" as well concerning the limitations on our clients' confidences? The general and overwhelming consensus seems to be "No," probably because we as lawyers have fairly clear avenues to address and deal with problems that may arise in this area. There are clear avenues of escape as well, if things really go wrong between lawyer and client.

First, when a lawyer determines that the course her client is on and through which the client is using her services is criminal or fraudulent, she needs to consult with the client and advise him that she is ethically prohibited from assisting him in such conduct.[6] This should be the end of the matter, with the client opting for the correct way of proceeding. If the client refuses to follow the lawyer's advice, the lawyer must

withdraw from the representation.[7]

Second, if a lawyer determines that the client has used the lawyer's work to actually harm someone financially, she must again consult with the client and urge that the client herself take steps to mitigate or rectify the harm done. If the client refuses, the lawyer must withdraw and, in addition, should disavow any of her work product produced to others that is inaccurate or deceptively incomplete.[8] In most cases, the disavowal of representations, documents and other products prepared by the lawyer based on what she later learns was inaccurate or incomplete information supplied to her by her client will meet any disclosure obligations required by the ethics rules.[9]

Clients should not have to seek the assistance of counsel in order to understand the terms and conditions of another lawyer's engagement letter. The better a client understands what the lawyer is trying to do on his behalf and the price he is expected to pay for those services, the smoother the representation is going to be and the happier the client is going to be at its conclusion. That should be the primary objective of every engagement letter and a real incentive to lawyers to "keep it simple."

Author's Note: Thanks to Phoenix lawyer Richard Alcorn for suggesting this topic.

endnotes

1. Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality,* 39 CATH. U. L. REV. 441 (1990).
2. This includes death. *See* ER 1.6(b), Rule 42, ARIZ.R.S.CT.
3. ER 1.6(d)(4).
4. ER 1.4(a) (Communication) requires, among other things, that the lawyer consult with the client about relevant limitations of the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the ethical rules or other law.
5. ER 1.5(b) (Fees). Contingent fee agreements need more disclosures concerning how expenses are to be accounted for and paid, and must in addition be signed by the client.
6. ER 1.2(d).
7. ER 1.16(a)(1).
8. This is what is known as a "noisy" withdrawal. For an excellent discussion on when such action is advisable and how to accomplish it, *see* ABA Formal Op. 92-366 (Aug. 8, 1992) (Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud).
9. *See, e.g.,* ER 4.1 (Truthfulness in Statements to Others) requiring a lawyer to disclose material facts to others when disclosure is necessary to avoid assisting a criminal or fraudulent act by a clien