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The Engagement Letter and the Residential Real Estate Attorney

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Introduction

In most legal scenarios, the reason an attorney is sought out and eventually hired by a client is to assist that client with a specific legal need. For example, a person charged in a criminal action hires counsel (or has counsel appointed by the State) to defend him or her against criminal prosecution. In a contract dispute, the attorney is retained by a client to seek money damages or an equitable remedy. Those who wish to prepare for death (life's inevitable end), retain counsel to prepare their estate - and consequently attempt to alleviate their loved ones from legal complications which could arise upon their passing. The real estate attorney's practice, however, can be unlike other practices of law. Each real estate transaction could potentially contain a number of non-real estate related legal components - all of which could affect the ownership of the real property, the client, as well as the attorney. So why is it that so many real estate law practitioners fail to obtain even the most simplified form of written engagement letter or fail to adequately define the *scope of their engagement* with their clients? Although the above scenario is not limited to the *residential real estate practitioner* (attorneys handling commercial transactions are certainly not immune to these same issues), this article is tailored for the attorney handling residential real estate transactions on a regular basis. Retainer agreement, engagement letter, whatever you want to call them. Have one.[1]

The General Rule Regarding Written (and Signed) Engagement Letters

With the exception of contingent fee cases,[2] the Rules Regulating the Florida Bar ("Rules" or "Rule") do not require that the attorney-client relationship be reduced to a written contract, signed by both attorney and client. Rather, in circumstances where the attorney has not regularly represented the client, prior to or within a reasonable time after commencing the representation, the Rules establish *a preference* for written communication between the attorney and the client as to the basis or rate of the fee as well as the costs.[3] In addition, where a legal fee is *nonrefundable*, the Rules require that the nature and amount of the nonrefundable fee be *confirmed* in writing.[4] This confirmation does not however require the attorney to obtain a signed acknowledgment from the client memorializing the terms of the fee. A letter from the attorney to the client setting forth the basis or rate of the fee and the intent of the parties in regards to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.[5]

Contingency Fee Arrangements

The Florida Bar has well established rules by which engagement letters in contingency fee cases are governed. Rule 4-1.5(f)(1) states that:

> [a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the 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.[6]

In addition, Florida Bar Rule 4-1.5(f)(2) states that

> [e]very lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered...whereby the lawyer's compensation is to be...contingent in whole or in part upon the successful prosecution or settlement thereof **shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer**....[7] (Emphasis added)

The Rules provide parameters governing the percentage the attorney is entitled to collect for his or her fee in addition to how those fees can be divided between lawyers in different law firms.[8]

The Unique Role of the Residential Real Estate Attorney

As alluded to in the preamble of this article, the residential real estate attorney's practice can be rather ambiguous. When dissected, a standard real estate transaction has potentially many components in addition to contract and title law. There are aspects of community association law, corporate law, tax law (both foreign and domestic), estate planning and asset protection that could all affect any particular transaction. While the attorney need not be versed in all of the above areas of law, it is the duty of the attorney to identify the aspects of the transaction which could potentially impact the client and allow the client to determine how he or she would like to address those areas not serviced by the attorney. The client may choose to retain the services of a Certified Public Accountant to address the tax-related issues or the client may choose to retain separate counsel for the services not covered under the attorney's scope of representation. It is also possible that the client may decide that he or she is not concerned with any of the additional aspects of the transaction and forego that type of representation all together. At a minimum, however, the

client should clearly comprehend the scope of representation offered by the attorney and have the choice to expand that scope either with the assistance of the attorney or through alternate means. Based on the breadth of any one residential real estate transaction, the potential for attorney malpractice can be significant based on the damage potential to the client; yet it is all too common for the residential real estate practitioner to forge head-on into a matter without even the most informal confirmation to the client (written or otherwise) setting forth the aspects of the transaction the attorney *is,* and more importantly, *is not* handling.

Transitioning to the Engagement Letter as a Standard Practice

Why would a real estate attorney willingly assume legal liability on a transaction by failing to properly outline the scope of engagement in writing to the client? I was guilty of this practice during my early years in private practice; however, upon taking refuge in a large firm with strict governance policies and procedures, it became evident that my days of handling a transaction without even so much as a handshake were, by mandate, a thing of the past. This was not an easy transition. Clients whom I had serviced for years were at first confused by the formal nature of the engagement letter process. They attributed the additional layer of "bureaucracy" to the large firm culture and equated this new procedure to increased fees. This was an incorrect assessment made by the client and served to reinforce, for me, that part of a lawyer's role is to educate clients on non-billable procedural matters as well as to abate any fears associated therewith. Clear and effective communication became a cornerstone of each new engagement. After some discussion, clients realized the benefits of the engagement letter for both the attorney and the client and it generally has avoided confusion and misunderstanding as to the role of the attorney in the transaction.

You know it is needed, so what's stopping you?

Timing. If you have practiced in the area of residential real estate law long enough, you have most likely been on the receiving end of the following statement from a potential client: "I purchased a house and I would like to know how much you would charge to represent me." Knowing exactly what was meant by the statement, my response is always the same: "If you've already *purchased* a house, you don't need me." This prompts the potential client to rephrase with what they believe sets them apart from other clients. "No (chuckle) I signed a contract, I just want to know how much you will charge to represent me." My reply is no less cynical: "So you've served as your own counsel for the contractual phase - now you want me to step in and handle the rest?" This primes a discussion which usually starts with the potential client saying "isn't it just a form?" and ending with the client feeling - shall we say - a tad bit humbled. Point being, the nature of our practice is that we often are faced with picking up where our "lawyer-clients" leave off. *What can go wrong, right? It is just a form.* The above scenario could give the attorney a false sense of informality that they are merely needed to make sure title is marketable. Stop. Take a moment and realize this is more (not less) of a reason to require an engagement letter. You want to make it clear to the client that they arrived at your doorstep with an already executed contract. If you did not assist the client with this portion of the service, why would you want to assume responsibility for the client's work?

The Title Company Dilemma. In Florida, a "title insurance agent" is a defined term under § 626.841, F.S. In order to be licensed to act as a title insurance agent, one need not be an attorney; the applicant need only pass a state exam to become licensed.[9] An attorney may issue title insurance without the requirement of licensure due to an exemption contained in the chapter.[10] The implication is that an attorney is not required to take the state licensing exam due to the fact that the attorney passed the Florida Bar exam. The involvement of non-attorney owned or non-attorney managed title agencies in the residential real estate arena has blurred the line between *legal representation* and *title insurance*. While this portion of the article is not intended as an attack on non-attorney owned title agencies, there is a stark difference between comprehensive legal representation and merely confirming title is insurable. Title agencies do not provide legal representation. However, they have become the norm in residential closing circles. The formality involved with the engagement letter process is a necessary break from that norm. The attorney who subscribes to a level of informality on par with title agencies is forgetting that the title agency protects itself with disclosure documents outlining their limited role. If it is important enough for a title agency to disclose to a customer that the agency is not providing legal representation, it is even more critical for the attorney to disclose to the client the scope of the attorney's representation.

Referral Sources. The typical real estate attorney acquires a significant number of his or her matters from licensed real estate agents. This referral source, when correctly educated by the attorney, can be a blessing. Where the real estate agent is not properly briefed by the attorney on both the importance of timing and the difference between legal representation and title insurance, the referral source can actually impede timely and effective representation, potentially damaging the client and the transaction. I have learned that it is critical to educate my referral sources on timing their referrals properly and that the terms of art in the industry of "closing agent" and "settlement agent" do not automatically denote legal representation. The correct timing to refer a buyer or seller of real property to an attorney is in advance of that person making an offer or accepting that offer, whichever is the case. While this may seem like a rather obvious consideration, real estate agents are often under significant pressures from

the buyer and seller as well as other realtors to expedite the process. The suggestion of attorney involvement during the negotiation phase could be perceived by those involved as an additional impediment to a binding contract. To overcome these negatives, the attorney must be responsive, in addition to knowledgeable. In larger law firms, the system for conflicts checks needs to be streamlined to avoid delaying the attorney's ability to converse with a potential client. In smaller firms without the same level of formality, managing a business as well as practicing law can be overwhelming and prevent the attorney from responding in a timely fashion. Whether large firm or small firm practice, the role of the attorney with respect to the referral source is the same. Specifically, the lawyer should educate the referral source on the benefits to the client and the referral source of the involvement of a competent real estate attorney prior to having a binding contract, the difference between legal representation and title insurance as well as your process of engagement. These should all be concepts your referral sources are versed in so the referral is smooth.

Fear of Judgment. Too often, attorneys expand their services to include real estate transactions and title work without much knowledge of the area. This is due in part to survival and, in some cases, greed. To those facing either or both scenarios, "don't take on work for the money [without the appropriate experience]."[11] You are not doing your clients or the practice any favors. Whatever your reason for practicing in this area without significant training, remember, this is not just another real estate transaction. A real estate acquisition (residential or commercial) is often the largest financial investment a client will make. The client's needs must be paramount. Only practice in this arena once you have a firm grasp of contract, real estate and title law. In addition, at a minimum, know enough to know the other aspects of law which impact the prospective transaction and do not fear telling a client "I don't do that work."[12] Use the engagement letter as a tool to define the scope of your involvement and do not allow your moral compass to waiver.

The Template Engagement Letter and Conclusion

The Residential Real Estate and Industry Liaison ("RREIL") Committee of the RPPTL Section of the Florida Bar, through a subcommittee chaired by this author, has drafted a sample form engagement letter which addresses most elements present within a residential real estate transaction. The template is available to all members of the RPPTL Section by accessing the member login at www.rpptl.org and proceeding to the RREIL Committee's web page.

The county in which the property is located will, along with the contract, dictate whether the buyer or the seller is responsible for selecting and paying the Closing Agent[13] for the title insurance premium and as such, the role of the attorney will fluctuate depending on the location of the property, the contract and the services selected by the client. This particular template was drafted with a "buyer-pay" contract in mind, and is intended as a starting point for the residential real estate attorney to tailor to the specific needs of the transaction and the client. At a minimum, the template engagement letter should define the scope of representation as well as detail the services not included in that scope.

A fee and/or cost retainer should become a standard practice, particularly to avoid violating the unlawful inducements rules of the Florida Department of Financial Services.[14] The Template Engagement Letter also addresses that any costs advanced by the attorney on behalf of the client would be reimbursed by the client. These provisions were added to clarify that the attorney is not advancing these costs as part of an unlawful inducement to obtain business and that the intention is for the attorney to be reimbursed for these costs. Provisions pertaining to granting consent to the title underwriter's audit of the firm's trust account and consent to electronic communication were included in response to avoid ethical concerns.

In sum, a retainer agreement/engagement letter can (in addition to all of the reasons discussed in this article) be a marketing opportunity used to differentiate yourself from a title agency and from other attorneys. Use it to show your value to your prospective clients.

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Endnotes

1 Brian Tannebaum, *The Practice* (American Bar Association, 2015).

2 R. Reg. Fla. Bar 4-1.5(f).

3 R. Reg. Fla. Bar 4-1.5(e).

4 R. Reg. Fla. Bar 4-1.5(e), "A fee for legal services that is nonrefundable in any part **shall be** confirmed in writing...." (Emphasis added).

5 R. Reg. Fla. Bar 4-1.5 Editors' Notes.

6 R. Reg. Fla. Bar 4-1.5(f)(1).

7 R. Reg. Fla. Bar 4-1.5(f)(2).

8 R. Reg. Fla. Bar 4-1.5(f)(4) (B) and 4-1.5(g).

9 §626.8417(3)(a) and (b), F.S. contain the full requirements for licensure.

10 §626.8417, F.S., states: "Title insurers or attorneys duly admitted to practice law in [Florida] and in good standing with The Florida Bar are exempt from the provisions of this chapter **related to title insurance licensing and appointment requirements."** (Emphasis Added). Note, the exemption only applies to the licensing and appointment requirements, not the Chapter's entirety.

11 Brian Tannebaum, *The Practice* (American Bar Association 2015).

12 *Id.*

13 Defined term in the FAR/BAR Purchase and Sale Contract.

14 Fla. Admin. Code 69B-186.010, interpretation of §626.9541(1)(h)3, F.S.