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What Should (and Should Not Be) in Your Appellate Representation Agreement

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I. Introduction

Your appellate representation agreement is (or should be) a document that clearly defines the rights, responsibilities and expectations of you– the appellate legal service provider– and your potential new appellate client. By the time the ink is dry on the parties' signatures, both attorney and client should know what is expected of them, and what they can expect to receive in return, for entering into the appellate representation agreement. If this paper were written in or before the mid-1980's, this paragraph would both begin and end this paper. It was not. This paper is written in the mid-two thousand teens. As Bob Dylan warned us half a century ago, the times (and a small, but very dangerous percentage of our clients), they are a changin'.

It is a scene that repeats itself over and over again throughout the years. New Appellate Client shows up in your office for an appointment asking you to draft a petition for writ of mandamus, to perfect an interlocutory appeal, or to handle a pending appeal in one of our State's appellate costs. After a discussion of the facts surrounding the potential representation, the client's expectations, the anticipated costs of the representation, your background, experience and ability, and your firm's resources and reputation, New Appellate Client agrees to hire you to represent him, her, or it.

You or your legal assistant pull up your firm's existing form of representation agreement from the firm's administrative database. The form agreement was originally created while Texaco v. Pennzoil was still pending in the First Court of Appeals. The firm's managing partner works under the theory that "if it was good enough to use then, it is good enough to use now." Or if you or your firm are like a small percentage of firms, the representation agreement has actually been tweaked a few times after the turn of the century (the 2000's, not the 1900's) to reflect new developments in attorney-client, attorney ethics, and legal malpractice law. How do I know this?

Because I have been asked to consult with lawyers and law firms about the representation agreements that they use. In the course of doing so, I have found many to be woefully inadequate.

Why do I say woefully inadequate? Back in the early 1980's, the typical species of bee found in the United States was fairly docile, would only attack when it was itself attacked, and usually only as a last resort at self-preservation. Its main interest in life was to fly from flower to flower, collect pollen and convert it to honey back at the hive. They were dependable, productive, hard-working, diligent and rarely aggressive.

In the mid-1980's, a new breed of bee– often referred to as killer bees– began to spread throughout North America. Killer bees react aggressively to disturbances as much as ten times faster than traditional honey bees. They have been known to chase humans for a quarter of a mile or more. To-date, killer bees have killed thousands, with their victims sometimes receiving vastly more stings than from their traditional counterparts. The aggressiveness of killer bees is not solely directed at humans. They frequently attack and kill horses and other livestock, as well as domestic pets.

Imagine that you are hiking through a state park. You come upon a tree laden with several bee hives. Knowing what you've read about killer bees, are you going to automatically assume that the bees flying nearby are gentle, docile traditional honey bees? Will you assume that they mean you no harm and walk as close to the hives and bees as possible? Or will you seek to manage the risk that this is a hive full of angry, aggressive, killer bees and take steps to protect yourself from the potential risk that results therefrom?

The prudent hiker will obviously seek to protect himself or herself from unnecessary risk. Doing so minimizes the risk of injury or death in case the hives turn out to be full of angry killer bees.

What do bees have to do with legal clients? Simply this. The overwhelming majority of potential clients who pass through your doors are comparable to traditional honey bees. They are honest, decent, thoughtful, considerate, responsible, truthful individuals or companies who come to you seeking help in resolving a legal problem. However, like the American bee population, over the past three or so decades, the pool of potential legal clients has been invaded by a new, aggressive and highly dangerous form of client. Representing a small percentage of overall clients, this type of client is seemingly willing to say anything, or to do anything, whether truthful or not, in order to achieve a legal objective, win a case, or walk away with a pre-determined sum of money. And in doing so, they care not whether that sum of money comes from the opposing party in litigation, your firm's reserve account or your firm's malpractice insurance policy. This type of client considers the threat or actual filing of a grievance, or a lawsuit alleging legal malpractice, or an equitable fee forfeiture proceeding to be a first strike weapon of choice providing the client necessary leverage over the attorney, law firm, and their professional liability insurance carrier, regardless of the appropriateness of doing so under the facts and circumstances presented.

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