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ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

Better with a Letter: Why Attorneys Should Use Engagement Letters

INTRODUCTION

Documentation of the attorney-client relationship constitutes a critical risk control technique for law firms. Memorializing the nature and scope of the attorney-client relationship with a thorough, well-written engagement letter will help resolve potential misunderstandings and also serve to establish good communications throughout the course of the relationship. Moreover, in the event of an attorney-client dispute, an engagement letter may protect an attorney in the event of an unwarranted legal malpractice claim.

As a leader in the lawyers' professional liability insurance marketplace, CNA strongly encourages its policyholders to consistently issue engagement letters. CNA has published *Lawyers' Toolkit 3.0: A Guide to Managing the Attorney-Client Relationship* to assist attorneys in this effort. *Lawyers' Toolkit 3.0* contains sample engagement letters, some of which are practice-specific, that attorneys can use as templates in drafting their own engagement letters. Prior to exploring *Lawyers' Toolkit 3.0*, however, it is important to understand existing rules and case law regarding the use of engagement letters.

MANDATORY ENGAGEMENT LETTERS

All states except California have developed rules of professional conduct based upon the American Bar Association ("ABA") Model Rules of Professional Conduct. ABA Model Rule 1.5, Fees, suggests that lawyers communicate key terms of the representation to clients, "preferably in writing," either before or within a reasonable time after the representation has begun.

Under certain circumstance, Rule 1.5 requires a written engagement letter. For example, if the attorney intends to charge a client a contingent fee, the fee agreement must be in writing. Similarly, lawyers in different firms who co-represent a client must reduce their fee agreement to writing.

Failing to comply with the rule on fees may encompass more than the threat of attorney discipline. In the introduction to the Model Rules, the ABA states that a violation of its rules is not designed to be a basis for civil liability and should not "give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." ABA Preamble and Scope, Comment 20. The ABA acknowledges, however, that since it rules "do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Id.

A handful of states have adopted rules that transcend ABA Model Rule 1.5 in requiring written engagement letters. Washington State requires that both contingent fee and flat fee agreements be in writing, and that contingent fee agreements be signed by the client. *Wash. State Ct. RPC 1.5 (c) and (f) (1)&(2).* A California rule dictates that if it is not a contingency fee contract, and "it is reasonably foreseeable that total expenses to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing." *Cal. Bus. & Prof. Code 6148.* Wisconsin requires lawyers retained by an insurer to represent an insured to "…within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide". *Wis. SCR 20:1.2 (e).* Wisconsin also establishes a $1,000 threshold for engagement letters, which must include the scope of representation and the basis or rate of the fee and expenses. *Wis. SCR 20:1.5.* New York rules prescribe that attorneys must provide clients with written letters of engagement, or in the alternative, obtain signed written retainer agreements for virtually all attorney-client matters unless the fee to be charged is expected to be less than $3,000. *22 N.Y. Comp. Codes R. & Regs. 1215.1 & 1215.2.*

The rules of professional conduct do not compel lawyers to use engagement letters for most cases and matters, and the majority of states have not promulgated additional rules that require greater use of engagement letters. Even when ABA Model Rule 1.5 mandates a writing, the requirements are fairly minimal and mostly concern the calculation of and/or division of legal fees. Despite the fact that the rules are generally permissive with respect to engagement letters, law firms should issue them on a consistent basis. Case law highlights demonstrate that law firms issuing comprehensive engagement letters fare much better than those that do not.

CASE LAW HIGHLIGHTS

The Importance of Proper Engagement

Identity of Client

Silberberg v. Meyers, 885 N.Y.S.2d 713 (Sup. Ct. 2009)

A bankruptcy attorney met with a married couple about filing a bankruptcy for the husband. The retainer agreement referred only to the husband although the wife paid the retainer. Shortly thereafter, the bankruptcy attorney sent the husband a follow-up letter indicating that he was representing only the husband, and that the transfer of their residence from the husband to the wife could cause the bankruptcy trustee to sue the wife to recover the husband's share of the equity transferred. As predicted, the trustee sued the wife, who subsequently sued the bankruptcy attorney for legal malpractice. The bankruptcy attorney moved to dismiss, contending that no attorney-client relationship existed between him and the wife. The court granted the motion to dismiss, finding that the bankruptcy attorney's letters to the husband proved that the representation was limited to the husband. The fact that the wife paid the retainer fee on behalf of the husband did not establish that an attorney-client relationship existed between the bankruptcy attorney and the wife.

Scope of Representation

Ambase v. Davis Polk & Wardell et al., 866 N.E.2d 1033 (2007)

A New York law firm represented a client in his administrative proceeding before the IRS. The client contended that the law firm committed legal malpractice by failing to pursue third parties for liability concerning the outstanding taxes. After reviewing the engagement letter, which stated that the law firm was representing only the client in the administrative proceeding with the IRS, the court ruled in favor of the law firm.

Payment of Fees

Katz, Teller, Brant & Hild, LPA v. Farra, 2011 WL 1591286 (Ohio App. 2nd Dist. 2011)

An Ohio law firm sued its former client for fees that it was owed. The client attempted to evade payment by contending that the law firm told him that it would seek its attorneys' fees from the opposing party. The court reviewed the engagement letter between the attorney and client, which stated that it was the client's responsibility to pay the law firm's legal fees, and ruled against the former client, citing the parol evidence rule.

Legal Defense Weakened Due to Missing or Poorly Drafted Engagement Letter

Failure to Limit Scope of Representation

Avocent Redmond Corp. v. Rose Electronics, et al., 491 F.Supp.2d 1000 (W.D. Wash. 2007)

A law firm represented Company A in a merger with Company B in 2004. After the merger, the law firm sent Company A an engagement agreement in which it said that it represented Company A, a wholly owned subsidiary of Company B, and its affiliates.

In 2007, Company B sued Company C, an alleged infringer of Company B's patents. The law firm entered an appearance in the patent matter on behalf of Company C. Company B moved to disqualify the law firm due to a conflict of interest. In support of its disqualification motion, Company B presented the engagement agreement sent to Company A by the law firm. The court found the engagement letter to be a decisive evidentiary factor in granting Company B's motion for disqualification. If the law firm wanted to limit the scope of its representation to Company A, it could have expressly done so by stating that it was only representing Company A and not any of its affiliates. Instead, however, the law firm expressly stated that it was representing not only Company A but its affiliates as well.

Failure to Identify Client

Home Care Industries, Inc. v. Murray, 154 F.Supp.2d 861 (D.N.J. 2001)

A corporation sued its former CEO, seeking a declaratory judgment that the severance agreement between them was unenforceable. The former CEO filed a motion to disqualify the law firm representing the corporation due to a conflict of interest. The former CEO argued that during his tenure with the corporation, this same law firm had represented him personally in a number of incidents that led to his departure from the corporation. The corporation and its law firm countered by stating that it only represented the corporation during the former CEO's tenure and that there was no express or implied attorney-client relationship with the former CEO.

The court sided with the former CEO, determining that his belief that the law firm represented him was reasonable given the conduct of the law firm. The court further stated: "The record is clear that the [law] Firm failed to inform [the former CEO] that its client was [the corporation] and not [the former CEO]. Further, the record does not contain a copy of the retainer agreement between Plaintiffs and the [law] Firm. An explanation of the [law] Firm's position as counsel for [the corporation] exclusive of its officers would have gone a long way to avoid the position that said firm finds itself during the instant matter."

Bayit Care Corp. et al. v. Einbinder, 977 N.Y.S.2d 665 (N.Y. Sup. 2013)

The president of a healthcare corporation sued a New York law firm for legal malpractice. The law firm moved to dismiss, contending that it only represented the healthcare corporation and not the president individually. The court denied the motion, finding that the law firm's retainer letters were ambiguous as to the identity of the clients. One of the retainer letters was addressed to the president and read, in relevant part: "This retainer letter is intended to express our mutual understanding regarding our legal representation of **you**." [Emphasis added.] The court further found that the president's use of the suffix "President" when he countersigned the retainer letters was ambiguous, and not definitive in resolving whether an attorney-client relationship existed between the law firm and the president.

Failure to Identify Who Is Paying the Legal Fees

Fredrikson & Byron, P.A. v. Saliterman, 2012 WL 6652633 (Minn. Ct. App. 2012)

A law firm sued the sole shareholder of a company that the law firm represented for outstanding legal fees. The law firm had an engagement letter addressed to the sole shareholder, which stated in relevant part: "Thank you for selecting [law firm] to represent **you** in the litigation matter concerning . . . ." [Emphasis added.] The trial court ruled in favor of the law firm on a summary judgment motion.

The sole shareholder appealed the summary judgment by contending that the company, and not he personally, was liable for the legal fees owed to the law firm. The appellate court reversed and remanded the trial court's decision, agreeing with the sole shareholder that the engagement letter was ambiguous. The court reasoned that it was unclear whether the use of the word "you" in the engagement letter referred to the sole shareholder or the company. The court further noted that the law firm never represented the sole shareholder personally, that the sole shareholder retained separate counsel to represent his personal interests, and that the engagement letter did not directly state an intention to hold both the company and the sole shareholder personally and primarily liable for the legal fees.

CAREFULLY CRAFTING AN ENGAGEMENT LETTER

As the case law suggests, it is imperative that lawyers carefully craft their engagement letters to provide clarity and guidance as to how the relationship will function and to whom it applies. CNA's *Lawyers' Toolkit 3.0* may serve as a useful resource for lawyers seeking guidance on how to draft effective engagement letters. Some of the key provisions found in the *Lawyers' Toolkit*, which is located on CNA's website, include:

Identity of Client

Specifically identifying by name the party whom the attorney intends to represent must be addressed in the engagement letter. Failure to delineate the identity of the client can lead others to believe that they also are being represented. If a court finds such a belief to be objectively reasonable, the attorney may be held liable to these others as well. In this section of the engagement letter, attorneys should avoid using pronouns such as "you" and expressly list the individual(s) and/or entity(ies) that they are representing. In some circumstances, attorneys may wish to specifically state that they are not representing certain individual(s) and/or entity(ies).

Scope of Representation

Perhaps the most important provision in an engagement letter, this section should be narrowly tailored to include only those tasks which the attorney has been employed to perform for the client. As each representation is unique, law firms should carefully consider the language to include when drafting this section. The letter also should state that a separate engagement agreement will be required if the client wishes to have other legal work outside the scope of this representation performed by the law firm.

Limited Scope of Representation

Concomitant with the Scope of Representation section, and to avoid any ambiguity, attorneys may wish to delineate the tasks they are not performing, as well as when the engagement terminates. For example, a trial lawyer who does not handle appeals should state in this section that the representation terminates at the end of the trial and that the client must seek other counsel for appellate representation. Trial lawyers also should address whether the scope of representation includes or excludes post-judgment contempt or enforcement, modifications or post-trial proceedings.

Fees and Billing Statement

Law firms should specify the manner in which clients will be billed and how often the legal bills will be submitted for payment. *Lawyers' Toolkit 3.0* includes sample engagement agreements for contingent fee, flat fee, and hourly fee arrangements. For hourly fee engagements, the letter should indicate the rates for lawyers and support staff expected to work on the matter.

Expenses

The engagement letter also should discuss how expenses will be handled. For larger expenses incurred with third parties, such as expert witnesses, law firms should consider indicating that clients will be billed directly by the third parties and are responsible for payment.

File Retention and Destruction

File retention and destruction should be addressed with clients at the outset of the attorney-client relationship. The engagement letter provides an opportunity for the law firm to explain what documents will be returned to the client, what will be retained, and how long the file will be maintained until it is destroyed. Having the client consent to these terms through the engagement letter saves the law firm from acting without client consent if the client disappears or dies during or subsequent to the attorney-client relationship.

Client Review of Agreement/Countersignature

Before clients countersign an engagement letter, they should confirm that they have read the entire letter, understand its terms, and agree to abide by these terms. Clients also should be informed that they have the right to have another lawyer review the engagement letter outside the presence of the retained law firm, and prior to countersigning the letter. This section of the engagement letter also should clearly state that the attorney-client relationship does not commence unless and until the countersigned letter is received by the law firm and any corresponding retainer is paid.

Other provisions, such as "Responsibilities of Law Firm and Client" and "No Guarantee of Success" included in *Lawyers' Toolkit 3.0* may be considered for implementation into their own engagement letters. The sample engagement letters in *Lawyers' Toolkit 3.0* are provided as a convenience for use in the practice of law and include illustrative language that attorneys may wish to consider using in their own engagement letters. In addition, each sample document should be customized for every engagement and prepared in accordance with applicable professional and regulatory requirements. CNA used the ABA Model Rules of Professional Conduct as a guide in creating these sample engagement letters. However, attorneys must consult their applicable rules of professional conduct, as well as the case law and ethics opinions of the relevant jurisdictions, when drafting their own engagement letters. In matters where attorneys expect to practice in other jurisdictions under state reciprocity requirements, the relevant rules, case law and ethics opinions also must be researched, and the limitations of such representation should be addressed in the engagement letter.

CONCLUSION

Engagement letters serve important purposes. They provide guidance to clients and may offer protection to attorneys in the event of a dispute between attorney and client. To reduce their exposure to legal malpractice claims, lawyers and law firms should implement risk control protocols that require engagement letters. Resources such as the CNA *Lawyers' Toolkit 3.0* make it easier for lawyers and law firms to draft comprehensive engagement letters. Both the legal profession and those who need legal services benefit from consistent engagement letter usage.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.