



# E&O Edge

## Lawyers Professional Liability Protect yourself by communicating effectively with clients through engagement letters

Risk management materials on the clear and consistent use of engagement letters, retainer agreements or employment contracts frequently appear in these pages and as part of loss control seminars. The reason for this focus is simple: signed engagement letters are an effective tool to reduce claims and avoid fee disputes

Too often we hear attorneys claim that they know their clients, that they use letters “where needed” or that the work was agreed upon verbally. There are no guarantees that the long-time client who shook your hand and agreed to the engagement will not make a claim. Equally important is clear and timely communication with non-clients who are involved in the engagement.

The essential points that should be addressed in an engagement letter are:

- Identity of the client and the attorney handling the case.

The engagement letter should clearly identify the client. If there are related parties who are not clients, those individuals or entities should be specified as non-clients and they should receive a copy of the engagement letter or a separate non-engagement letter, as may be appropriate. Once the engagement is underway, you should not offer advice to the non-client individuals / entities, negating the effect of the non-engagement letter.

A common example is a closing where you represent the lending institution and the buyers do not have their own counsel. You may want to offer advice or answer a question during the closing in an attempt to keep the proceedings on track or to be helpful. This can create the false

impression in the buyers’ minds that you represent them and thus open the door to a claim. Use of a standard non-engagement statement that is always delivered to non-clients is strongly recommended. It would be better to delay the closing if the buyer wishes to engage counsel than to continue with the closing and offer advice to the buyer for expediency’s sake.

Consider an engagement on behalf of a corporate client: Do you represent the corporate entity only? The owners? The director and officers? If there are two or more owners, their interests may not align. Are you representing all of the owners or only some of them? Again, the engagement letter should spell out who is a client and who is not.

- Scope of services

The client may have several pending legal issues and you should clearly outline the specific services to be rendered. If there is any chance for ambiguity, the letter should go on to state what is outside the scope of the engagement. Further, it may be prudent to state when the engagement ends. As an example, rather than only citing a specific lawsuit as the subject of the engagement, you may also state that you will not handle the appeal or ancillary litigation.

- Right of withdrawal

The engagement letter should also detail your right to withdraw from representation. If you do withdraw, a disengagement letter should always be sent to the client. You should not rely on the filing of a motion to withdraw with the court in litigated cases as the client may not receive notice of this motion and you

cannot control the timely delivery of that notice.

- Fee arrangements

All components of the billing should be communicated to the client, including the basis for the fee and the frequency of billing. The letter should specify if the basis for the fee is flat, hourly or contingency. Will the billings be monthly? Quarterly? When will the payments be due to the firm? What out-of-pocket charges will be billed to the client? If expert witness fees are to be billed back to the client, you should put this in writing again when discussing the hiring of any expert.

Forty percent of suits for fees result in a counterclaim for negligence. While we strongly counsel against suing for fees for this reason, you will need this written fee agreement in order to pursue the client for any outstanding amounts. The goal, of course, is to reduce the instances of unpaid fees through clear and consistent communication.

Finally, once the matter is concluded, you should issue a closing letter to the client. This can be a standard letter that is delivered with the final documents for the case, also thanking the client for the opportunity to be of service. This letter can be instrumental in setting the statute of limitations date should a claim arise. The cleaner and earlier the termination of the engagement, the stronger the SOL defense will be.

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