

PERSPECTIVES

An attorney's guide to insurance and risk management

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Letters of the Law

A Powerful Loss Prevention Tool

A recently completed ABA study on legal malpractice reveals that 17% of all malpractice claims result from improper or inadequate client relations.¹

DPIC Companies' own claim statistics clearly reveal that engagement letters are not only a means of establishing good client relations from the outset of a new matter, but can also be an effective tool to reduce the frequency and severity of claims.

Engagement letters solidify and document both the client's and the firm's expectations. A good rule of thumb is if the representation is not sufficiently important to warrant an engagement letter, perhaps the matter should not be taken on.

Effective Engagement Letters

We recommend that every engagement letter include the following elements:

➤ **Recipient** – In order to serve its intended purpose, the letter must be addressed to the individual or group to whom the firm will provide services.

By getting the person(s) responsible for having retained you to sign and return the letter, you will have helped ensure that he or she is in agreement with your interpretation of the assignment.

➤ **Identify the client** – Specify the entity or entities to be covered by the engagement. If re-

tained by a corporation, state whether you will represent the interest of the president, the board of directors or the shareholders.

If the engagement involves services provided to individuals, potential liability can be avoided by simply stating that you represent, for example, the husband as opposed to the husband and the wife.

➤ **Scope of services** – Clearly and fully describe the services you have agreed to perform, and be as specific as possible.

Many law firms ambiguously state in their engagement letters that they have been retained to represent a client's interest with regard to "x accident" or to "the above ruling/case citation/tax interpretation." Such ambiguity can be extremely dangerous from a risk management perspective.

In one representative case, a firm was retained "to recover damages for injuries sustained in an auto accident" of a certain date. The firm, understanding its role to be filing and prosecution of a civil suit, did not pursue work-

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ers compensation remedies. When the litigation period expired on the workers comp claim, the client sued the attorney for malpractice.

Because the engagement letter stated broadly that the firm's responsibility was to handle matters related to the accident, the firm and its carrier paid a large settlement on a matter that the firm never consciously accepted.

- **Limitation of services** – If there are *potential* issues that you do not wish to address in your representation, warn the client to arrange protection through other means.

For example, when representing a party to a divorce proceeding, state in the engagement letter that the representation will not include the sale of the house.

Again, be as specific as possible so that you are not subsequently blamed for having failed to address an issue that you never intended to take on.

- **Client's responsibilities** – Specify the tasks the client must perform. State that you will rely on the client to provide complete and accurate information when performing services.

Some firms include in their letters that the client is responsible for notifying the attorney of any change of address or phone number, as well as any extended travel plans.

- **Basis of charges** – Explain to the client how your fees will be computed. Many firms specify which attorneys and paralegals will be working on the matter, and provide the respective hourly rates.

Clearly indicate that out-of-pocket charges, such as long distance telephone calls, copying expenses and charges for computerized research will be passed on to the client. As legal consumers become more sophisticated, they tend to request specific guidelines regarding billed expenses.

By setting forth your procedures in the engagement letter, you will address the client's concern and lay the foundation for avoiding potential problems.

- **Payment schedule** – Set forth a payment schedule. Vague wording cannot be easily inter-

preted, much less enforced.

By including a clause reserving the right to discontinue the representation if payment is not promptly made, you will lessen the likelihood that you may have to file a suit for fees.

This is an important consideration, as approximately 40% of such suits result in counter-claims alleging malpractice.²

- **Notification of possible conflicts** – When appropriate, an engagement letter should warn your client of potential conflicts that could arise.

In cases involving joint representation, (1) give examples of potential conflicts, (2) suggest that the client consider discussing the possibilities with independent counsel, (3) warn that all client confidences are to be shared with the jointly represented parties, and (4) stipulate that the clients' signatures on the letter constitute consent.

In addition, outline the extent to which each party will be responsible for fee payment, and describe the actions you will take should a conflict arise. You may add that while you do not anticipate a conflict, it is essential that your clients be aware of the possibility. If you are hesitant to put this in writing, blame it on your insurance company!

- **Offer to discuss the letter** – Suggest that the client call you for an explanation of any terms of the letter that they do not understand.

The client may not call, but by suggesting further discussion in writing, you will not only have improved client relations, but will have a defense from possible assertions that the client did not know what he or she was signing.

- **Client signature** – To be effective, an engagement letter must bear the client's signature in agreement to the terms of the representation.

Summary

By putting the above information in written form, using a cordial tone and language that is easily understood, you will establish yourself as a "client's lawyer." Your client will know what to expect and will appreciate having been informed, and the tone will have been set for a mutually benefi-

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cial relationship.

Many firms that now use engagement letters originally feared that the practice would have a chilling affect on their client relations, but they soon found that their clients appreciated receiving a “road map” of the representation.

If you have any questions about engagement letters and how they can help your firm manage its liability risk, please give us a call.

Footnotes:

¹ABA Standing Committee on Lawyers Professional Liability and the National Association of Bar-Related Insurance Companies (NABRICO) (1996).

²R. Mallen & J. Smith, *Legal Malpractice* 216 (3rd Ed. 1989).

Article courtesy of DPIC Companies

Disclaimer: “Perspectives” is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.

Cavignac & Associates

I N S U R A N C E B R O K E R S

Check out our Website!

Insurance information ✧ Copies of our newsletters ✧ Information about our company

www.cavignac.com

Calm Before the Storm: Prepare Today!

If an unexpected disaster strikes, will your firm bounce back, or bite the dust? Businesses that recover quickly are those that plan in advance. This involves not only purchasing the right insurance, but developing and maintaining an adequate business recovery plan.

The Insurance Information Institute offers these tips for business owners in order to minimize their risk of damage in an emergency:

- Train employees in fire safety, particularly those responsible for storage areas, maintenance and operations where open flames or flammable substances are used.
- Modernize your electrical system since faulty wiring causes a large percentage of *non-residential* fires.
- Situate your business in a fire-resistive building – a structure made of non-combustible materials with fire-walls that create barriers to the spread of fires – and in a building with a fire alarm system connected to the local fire department.
- Limit storm-related damage by making sure the building conforms to damage-resistant building codes.

Call us for more information on how to keep your business a safe one. ✧

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I N S U R A N C E B R O K E R S

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