



Affinity Programs

# PROFESSIONAL COUNSEL<sup>SM</sup>

Advice and Insight into the Practice of Law<sup>®</sup>

## Better with a Letter: Key Considerations in Engagement Letters Usage

### Introduction

As a leader in the lawyers' professional liability insurance marketplace, we stress the importance of engagement letters in our articles, guides and risk control courses. The benefits of engagement letter usage flow to both the law firm and client. From the client's perspective, memorializing the terms and conditions of the attorney-client relationship helps establish good communications. It can also serve both as a reference guide and to avoid any misunderstandings between the law firm and client. For lawyers and law firms, documentation of the terms and conditions of the relationship constitutes a critical risk control practice that may help to deter or minimize any claim exposure.

Best practices and sound risk management dictate that law firms use engagement letters for all new clients and new matters.

Notwithstanding our continued messaging on the advantages of engagement letters and the relative ease in drafting them, many law firms fail to use them on a consistent basis. This failure to document may be due, in part, to the fact that the ABA Model Rules of Professional Conduct do not compel lawyers to use engagement letters for most cases and matters. Moreover, the majority of states have not promulgated additional rules that require greater use of engagement letters. Although ABA Model Rule 1.5 mandates documentation, such as when the law firm charges a contingent fee, the requirements are fairly minimal and primarily address how fees and expenses will be calculated or divided. While lawyers should become conversant with their jurisdiction's rules and requirements with respect to fee agreements, the rules of professional conduct represent the minimum standards of conduct with which lawyers must comply in order to maintain their law licenses. Best practices and sound risk management dictate that law firms use engagement letters for all new clients and new matters. Some recent cases illustrate why and how engagement letter usage can minimize claim exposure.

### Identity of Client

Failure to delineate the identity of the client can lead non-clients to believe that they are also being represented by the law firm. If a court finds such a belief by a non-client to be reasonable, the law firm may be liable to the non-client even though the law firm did not intend to enter into such an attorney-client relationship. In some circumstances, law firms may wish to send a “we do not represent you” letter to anyone it believes may be confused over their status as a non-client. Ambiguity over client identity can have negative repercussions for law firms.

In a recent case decided by the Sixth Circuit Court of Appeals<sup>1</sup>, two owners of a number of companies engaged a law firm to help them structure the purchase of a distressed company in a way where the pension liability of that company would not attach to them or any of their other companies. The owners did not name the companies, and the law firm never asked for the company names. The law firm worked on the matter without preparing an engagement letter. Unfortunately, the law firm’s structured purchase did not prevent the pension liability from attaching to one of the owners’ companies, which resulted in the owners bringing a legal malpractice claim against the law firm. The law firm defended itself by arguing that it only represented the owners and did not represent any of their companies. The jury decided that the facts and circumstances indicated that the law firm represented the owners and their existing company, which assumed the pension liability. The Sixth Circuit appellate court ruled that sufficient evidence supported the jury’s decision.

An engagement letter that specifically identified the clients may have helped the law firm avoid liability. At a minimum, a further discussion with the clients about whether or not the owners’ companies also were clients may have caused the law firm to either decline the representation or structure the purchase in a different way that resulted in no pension liability from the distressed company being incurred.

Ambiguity over client identity can have negative repercussions for law firms.

### Scope of Representation

Perhaps the most important part of the engagement letter, this section should be narrowly tailored to include only those tasks that the law firm 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. Any changes to the original scope of representation during the pendency of the case or matter must be memorialized and sent to the client as well—either in a new engagement letter or as a supplement to the original engagement letter. If a law firm provides legal services outside the scope of representation and fails to document such a change in writing to the client, it renders the scope of representation null and void and also expands the risk of a claim for the law firm.

A New York case<sup>2</sup> proves how a well-defined “scope of representation” section in an engagement letter can protect law firms. In this case, the law firm agreed to a limited-scope *pro bono* representation of a client who had recently been expelled from a college of osteopathic medicine. The engagement letter stated, in relevant part:

Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the ‘College’). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter. This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you. The scope of the engagement may not be expanded orally or by conduct; it may only be expanded by a writing signed by our Director of Public Service.<sup>3</sup>

After the college refused to reconsider the client’s expulsion, the client sued the law firm for failing to take further actions, such as negotiation with or litigation against the college. The law firm moved to dismiss the lawsuit, attaching the engagement letter as proof of its limited scope engagement. The New York court affirmed the lower court’s decision to uphold the dismissal of the lawsuit, ruling that the law firm could not be held liable for failing to act outside the agreed upon scope of representation.

<sup>1</sup> *Cohen v. Jaffe Raitt Heuer and Weiss et al.*, 768 F.Appx. 440 (6th Cir. 2019)

<sup>2</sup> *Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 A.3d (2nd Dep’t. 2019)  
<sup>3</sup> *Id.*

### Outside Counsel Guidelines

A growing number of corporate clients insist that law firms accept their Outside Counsel Guidelines (“OCGs”) as a condition for law firms to win their legal business. Initially, companies relied on OCGs to establish billing guidelines and to set expectations with law firms regarding expenses and legal tasks that required advance approval. Over the years, OCGs have become more expansive and now establish terms and conditions for issues that significantly transcend mere billing practices. Many OCGs state that any conflicts between the OCGs and a law firm’s engagement letter require resolution in accordance with the OCGs. Law firms must create and implement a review system for OCGs and decide whether to accept or attempt to negotiate certain provisions in the OCGs or decline the representation.

One area that law firms must analyze when reviewing OCGs is the identity of the client. Some corporate clients will dictate in OCGs that legal representation means that the law firm also is representing the parent company and any and all subsidiaries of the parent company. This condition can create challenging conflict of interest issues for law firms throughout the entire course of representing the corporate client.

A recent United States Court of Appeals case<sup>4</sup> serves as an admonition to law firms to heed the language in OCGs. In this case, the corporate client brought motions to disqualify against one of its long-time law firms (hereinafter “the Law Firm”). The Law Firm had represented an affiliate of a large corporation in trademark, copyright, and advertising issues for almost two decades. The Law Firm agreed to the affiliate’s OCGs that broadly defined the Law Firm’s client as not only the affiliate, but the parent company and all its other subsidiaries and affiliates as well. The OCGs also required the Law Firm to run conflict checks and that when a conflict is discovered, only the general counsel for the parent company was authorized to approve and sign any conflict waivers.

In 2015, one of the parent company’s other affiliates sued a drug company for alleged patent infringement. Two lawyers from a different law firm, who had been representing the defendant drug company, joined the Law Firm as lateral hires in 2018 and continued to represent the defendant drug company, which was now a new client for the Law Firm. Despite being aware of the conflict, the Law Firm never sought nor obtained a conflicts waiver from the parent company.

The court granted the parent company’s disqualification motions, ruling that the Law Firm had agreed by contract (i.e., through the OCGs) that the client included the parent company and all its affiliates and subsidiaries. Moreover, the court determined that even in the absence of the OCGs, a sufficient nexus existed between the corporate entities involved to give rise to a corporate affiliate conflict of interest.

Once law firms agree to OCGs, they must abide by their terms and conditions. If during the course of the representation, the law firm discovers a conflict, it should either seek a waiver or decline the potential new representation that would cause the conflict. As a result, the law firm may be compelled to refrain from bringing a lateral hire candidate with a conflict to the law firm.

### Arbitration Clauses

Lawyers often inquire as to whether their law firms should include arbitration provisions in their engagement letters. CNA neither encourages nor discourages the use of arbitration provisions in engagement letters. Lawyers should consult the relevant jurisdiction’s laws and rules to ensure that such a clause is permitted. Some jurisdictions limit arbitration clauses to fee disputes, while other jurisdictions permit them for legal malpractice claims as well. Even if arbitration clauses are permitted in the relevant jurisdiction, lawyers should weigh the benefits and risks of the arbitration process versus a regular court proceeding. The decision on whether to use an arbitration clause in an engagement letter entails a fact-specific and jurisdiction-specific analysis.

If such an analysis leads to a decision to use arbitration clauses in its engagement letters, a law firm should take the following steps. First, examine any statutes and case law on arbitration clauses in the relevant jurisdiction to ensure that the language used will be valid and enforceable.

Second, draft the arbitration clause in a manner that will defeat any arguments that the clause is unconscionable or violates public policy. For example, failing to inform a client that agreeing to an arbitration clause will waive the client’s right to a jury, broad discovery, and appellate review, would violate public policy.<sup>5</sup>

<sup>4</sup> *Dr. Falk Pharma GMBH et al. v. Generico, LLC et al.*, 916 F.3d (Fed. Cir. 2019)

<sup>5</sup> *Castillo v. Arrieta et al.*, 368 P.3d 1249 (N.M. 2016)

Third, law firms must obtain the informed consent of their clients to the terms and conditions of the arbitration clause.<sup>6</sup> Informed consent means explaining the potential benefits and disadvantages of agreeing to the arbitration clause. The client consent must be memorialized in either the engagement letter or some other document. In addition, when presenting this issue to clients who are unsophisticated legal consumers, the lead lawyer on the matter should have a discussion with the clients about the arbitration clause in the unlikely event that it would need to be invoked.

Finally, law firms should advise clients that they have the right to seek independent counsel about the advisability of consenting to any arbitration clause,<sup>7</sup> as well as the entire engagement letter itself. In addition, clients should be provided sufficient time to consult with independent counsel. Failing to adhere to any of the aforementioned steps will most likely render any arbitration clause unenforceable if challenged.

<sup>6</sup> *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A.3d 729 (ME 2017)  
<sup>7</sup> *Owens v. Corrigan et al.*, 252 So.2d 747 (Fl. Ct. App. 2018)

## Conclusion

There are, of course, many more provisions necessary than those mentioned above to include in an engagement letter in order to delineate the contours of the attorney-client relationship in a comprehensive fashion. Additionally, all engagement letters should be countersigned by the client in order to eliminate any later contention by the client that the client never received it. Please see CNA's [Lawyers' Toolkit 4.0](#) for sample provisions and language that you may want your law firm to incorporate in its engagement letters. While engagement letters will not prevent or defeat all claims of legal malpractice, their value as a risk control tool is undeniable. Sound law firm risk management practice encompasses consistent usage of well-written robust engagement letters in order to enhance the attorney-client relationship and help to mitigate potential exposure.

**This article was authored for the benefit of CNA by:**

### Sean Ginty

Sean Ginty is the Risk Control Director for CNA's Lawyers Professional Liability Program. He collaborates with other CNA Risk Control lawyers on the design and content of lawyers' professional liability risk control services, products and publications. Sean lectures frequently at CNA-sponsored events and at state and local bar associations and national seminars hosted by industry-leading organizations. He also writes articles focusing on law firm risk control and professional responsibility issues. Prior to joining CNA, he served as Chief of Staff and General Counsel for an Illinois state agency and practiced law with a Chicago-based law firm, as well as serving as conflicts counsel for an international law firm. He is admitted to practice in Illinois and United States District Court, Northern District of Illinois.

For more information, please call us at 866-262-0540 or email us at [lawyersrisk@cna.com](mailto:lawyersrisk@cna.com)