

Will you

# Rules of **Engagement**

Write Engagement Letters that Allow the Firm's Service to Soar





BY MARCIA WATSON WASSERMAN

Law firm managers and owners that do not secure written engagement agreements with clients to document matters handled by their firms are exposing the firm to risk. Managers at these firms are wise to implement using engagement letters and creating a standard client-intake process.

In some jurisdictions (California for example) written fee agreements are required when an attorney represents a client on a contingency basis — or in noncontingency matters, when the total expense to the client will exceed \$1,000. Whether engagement agreements are required by statute or not, written fee agreements are a way to clearly communicate mutual expectations to a client from the outset of the relationship. They serve as an effective risk management tool as well.

Before documenting an engagement letter, each firm should have a mechanism in place to screen potential new matters. As difficult as it may be to turn down new business, it is important to screen matters by considering these issues:

- Has the client previously changed attorneys? If so, the attorney needs to explore why the prior firm was terminated. If the explanation seems inadequate, or several law firms have represented the client, is this the kind of business risk the firm really wants?
- Is the matter within the area of the individual lawyer's specialty or the firm's area of expertise? Is it safer to refer any matter that is not to another law firm that has such expertise?
- Is the client's matter larger than the matters usually handled by the firm? If so, does the firm really have the required resources to handle it with full professionalism?
- Is the client having serious financial problems? If the financial viability of the client depends on a favorable outcome and a favorable outcome cannot be assured, might the client look to the firm if the results do not meet its expectations?

- Is the client overly concerned about cost? Unrealistic client expectations about the cost of services could lead to fee disputes down the road.
- Does the client want the firm to hold large amounts of cash or property? This situation presents a red flag that perhaps the client is trying to hide assets or otherwise conduct itself illegally.
- Does the matter involve novel issues of law or fact? As interesting as the matter may appear now, if there is no precedent for it, it may be hard to prove at trial.
- Do tight deadlines need to be met in order to preserve the client's

rights? If so, consider the firm's ability to handle the matter on a timely basis.

- Does the client have unrealistic expectations? (Does it, for example, anticipate a recovery of millions of dollars for a minor slip-and-fall accident?) The firm should only undertake such representation if the client has a clear understanding of the potential recovery.
- Does the client exhibit irrational behavior (for example, "Get me out of this marriage at any cost")? A client who is emotionally upset now may be unhappy with the result later, and this could lead to a malpractice claim.

- Does the firm have, and does it regularly use, a computerized docket/calendar/conflict-of-interest program? In today's automated world, there is no reason to keep this information manually. The conflict portion of the database should contain potential clients that have been declined, names of parties added during the pendency of an action, and officers, directors, relatives, parent and subsidiary companies. Maintain the master calendar on the firm's network. Print and distribute it at least weekly, and make it accessible online to all attorneys, paralegals, law clerks and legal secretaries.

Further, from a practice management and marketing perspective, the firm should also consider the following criteria:

- *Stature of the client.* If the client is a major company, and the firm is trying to develop larger clients as a marketing goal, consider handling the matter, even if it is small.
- *Size of case and fee potential.* Make a risk-management assessment. Is this the size case the firm wants to handle? Are the potential fees adequate?
- *Nature of case.* Is the subject matter of the case in a niche area that the firm has expertise in or wants to develop?
- *Source of referral.* If the referral source is one that frequently refers matters to the firm, or conversely, if this is the referral source's first referral, what criteria should be used to determine whether to accept the matter?
- *Staffing availability.* Does the firm have the current ability to adequately staff the matter? If not, the matter should probably be declined.
- *Credit worthiness of client and probability of prompt payment.* The ability to pay an initial retainer does not guarantee that the client has the financial means to pay fees on a current basis. Particularly if this is a new client to the firm, consider researching

**SAMPLE CONFLICT WAIVER LETTER**

Date \_\_\_\_\_

Mr./Ms. \_\_\_\_\_  
Address \_\_\_\_\_  
City, State, Zip Code \_\_\_\_\_

Dear \_\_\_\_\_:

Thank you for the opportunity to represent you (list individual names and entities in connection with (describe matter). (Incorporate form engagement letter if new engagement).

Each of you have been advised that there may be appear to be a conflict based on (e.g. XYZ Law Firm's current and on-going representation of \_\_\_\_\_)(list individual names and entities) in connection with (describe matter). You knowingly agree to waive any potential conflict that may exist at this time based on the fact that: (describe facts). Further, you acknowledge that you have relied on independent counsel in consenting to XYZ Law Firm's representation of you.

This letter contains all terms of the agreement between us applicable to our representation of you and may not be modified except by a written agreement signed by each of us. A copy of this letter is being sent to all affected parties.

We believe the foregoing correctly sets forth our understanding, but if you have any questions, please let us know. If you find the arrangements acceptable, please acknowledge your agreement to the understanding by signing and returning this letter to us.

Sincerely,  
XYZ Law Firm

By: \_\_\_\_\_

The undersigned understands and agrees to all of the foregoing terms and conditions of the above-described agreement.

By: \_\_\_\_\_ Date: \_\_\_\_\_  
By: \_\_\_\_\_ Date: \_\_\_\_\_

SAMPLE CLIENT DECLINATION/NON-ENGAGEMENT LETTER

Date \_\_\_\_\_

Mr./Ms. \_\_\_\_\_  
 Address \_\_\_\_\_  
 City, State Zip, Code \_\_\_\_\_

Dear \_\_\_\_\_:

The purpose of this letter is to confirm, based on our conversation of (date), that XYZ Law Firm will not represent you in (describe matter) because (reason for declination). Our decision to decline this case should not be construed as a statement of the merits of your case.

You should be aware that any action in this matter must be filed within the applicable statute of limitations. I strongly recommend that you consult with another attorney concerning your rights in this matter.

Sincerely,  
 XYZ LAW FIRM

By: \_\_\_\_\_

## Engagement Agreements/ Nonengagement Letters Issue Checklist

### Engagement Agreements

- Client and attorney identity
- Conflict of interest and attorney/client privilege issues
- Scope of service
- Responsibilities of attorney and client
- Chronology of events
- Fee arrangement
- Payment of costs and disbursements
- Billing format, cycle and payment expectations, including interest
- Retainer terms
- Delegation of work assignments
- Rate changes
- Withdrawal
- Arbitration provisions
- Binding provisions
- Execution by attorney and client

### Nonengagement Letters

- Declination of Representation
- Statutes of Limitation and Other Sensitive Issues
- Duty to Seek Other Counsel
- Conflicts of Interest

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the client's credit history with Dunn & Bradstreet or some other service prior to accepting the matter.

- *If the firm is substituting in on an existing matter (particularly in litigation), perform adequate due diligence as to the client's reason for changing law firms.*
- *Impact on subsequent litigation (as to potential conflict).* For example, agreeing to represent different but similarly situated clients under opposing theories of law could lead to a conflict of matter. Or undertaking representation of a party in a litigation matter while representing an opposing party in other matters could lead to a conflict.
- *Ability to timely terminate representation in the event of nonpayment of fees.* The firm needs to analyze the matter or

transaction to determine the viability of terminating representation of the client if fees are not paid.

- *Adequacy of retainer.* In the best of all business circumstances, retainers should be "evergreen," that is, replenished by the client on a monthly basis. Absent an evergreen retainer, make a determination as to the estimated fee-and-cost budget required to handle the matter and retain an appropriate retainer. An example of a typical retainer is an amount equal to the first month's legal fees and costs.
- *Terms of engagement letter.* Are the terms acceptable to both the firm (and not just the individual lawyer who wants to handle the matter) and the client?

When interviewing a prospective client, in order to avoid acquiring disqualifying information, the lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. When the disclosed information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should advise the prospective client or decline the representation. Then the firm should send a client declination/nonengagement letter to the declined client. (See Declination Letter.) Further, information about the declined client should be entered into the firm's conflict-of-interest database through the completion of the relevant portions of a new matter memorandum form. (See New Matter Memorandum.)

If a potential conflict arises during the course of the initial interview with the client, the firm should not, absent a signed conflict waiver letter from all parties to the matter (or a determination by the firm that a conflict waiver letter is not required or that no conflict exists) undertake representation of the client. (See sample Conflict Waiver Letter.)

There are many circumstances that could lead to possible conflicts of interest:

- representation of two or more parties in a matter (for example, two partners in a general partnership);
- representation of a client in a matter against a prior client;
- representation of a client when one of the firm's lawyers serves as a director or officer in a client's company; and
- representation of a client when compensation for the representation is paid for by someone other than the client.

Before preparing an engagement letter, use the new matter memorandum form to ensure you obtain enough relevant information from the client to conduct a detailed conflict search of the firm's database. This could disclose a conflict that was not otherwise revealed

**NEW MATTER MEMORANDUM  
XYZ LAW FIRM**

DATE: \_\_\_\_\_  
 FROM: \_\_\_\_\_ TO: \_\_\_\_\_  
 FULL CLIENT NAME: \_\_\_\_\_  
 CLIENT AKA: \_\_\_\_\_  
 NAME OF CONTACT WITH CLIENT: \_\_\_\_\_  
 ADDRESS: \_\_\_\_\_  
 TELEPHONE NUMBER: \_\_\_\_\_ E-MAIL ADDRESS: \_\_\_\_\_  
 FAX NUMBER: \_\_\_\_\_

NEW CLIENT  
 NEW MATTER FOR EXISTING CLIENT  
 SUPPLEMENT TO PREVIOUS NEW MATTER MEMORANDUM  
 DECLINED CLIENT (IF DECLINED CLIENT, COMPLETE TOP PORTION OF FORM, CONFLICT INFORMATION RE: CLIENT AND ADVERSE PARTIES, AND WHETHER DECLINATION LETTER HAS BEEN SENT)

LAWYER(S) RESPONSIBLE: \_\_\_\_\_  
 ASSOCIATED ATTORNEYS: \_\_\_\_\_  
 BILLING PARTNER: \_\_\_\_\_  
 COMPLETE MATTER OR FILE NAME: \_\_\_\_\_  
 NATURE OF CASE OR MATTER: \_\_\_\_\_  
 AREA OF LAW: \_\_\_\_\_

**CONFLICT INFORMATION**

CONFLICT OF INTEREST CHECK: Provide as much of the following as possible for client and adverse/other parties:  
 INFORMATION RE: CLIENT

List client name(s), parent - if any- partners' names, names of officers, directors, subsidiaries, and related parties (including spouses and immediate family members, if known). Please indicate the clients' relationship to this matter.

INFORMATION RE: ADVERSE PARTY(IES)

List all adverse parties, include parent names. With each, please indicate the party's relationship to this matter. (If a bankruptcy matter, list lenders, 2 largest unsecured creditors and other major parties).

during the prospective client's interview.

Also use the new matter memorandum to gather information about the nature of the matter so a new file can be opened. In addition, the form should also be used as a "Supplement to a Previous New Matter Memorandum" to update the conflict/client database when additional parties are added to the matter. Note: If the new matter memorandum is circulated within the firm, it is important that confidential information (such as the client's Social Security number and driver's license number — if the firm is representing an individual and this information is relevant to the individual matter) be obtained on a separate confidential form that is not distributed to attorneys in the firm (due to laws governing privacy of individuals).

Once the client has been screened and the matter accepted by the firm, draft an engagement agreement that adequately documents the firm's terms and expectations and the client's agreement. Firm managers should make sure the following issues are addressed in engagement agreements:

- *Identity of the client.* The letter needs to specify the proper name(s) of the client(s). If the potential client is a corporation, the letter needs to state whether the client is the parent corporation, the board of directors or perhaps a subsidiary company. The letter needs to be specific about who the client is and not refer to the client as "you." Any significant individuals who are not being represented should be identified as well.

**INFORMATION RE: OTHER PARTY(IES) WHO ARE NOT ADVERSE**

List all involved or interested parties. Include parent names. With each, please indicate the party's relationship to this matter. (If a bankruptcy matter, list members of creditors' committee when appointed. If appointed subsequent to the opening of the matter, a second conflict check must be run.)

FOR LITIGATION MATTERS: The following must be completed.  
COMPLETE COURT CAPTION INCLUDING ALL ET ALS (BY ATTACHMENT IF LENGTHY)

XYZ REPRESENTS: PLAINTIFF(S) DEFENDANT(S) DEBTOR CREDITOR  
OTHER \_\_\_\_\_

COURT AND COURT NUMBER \_\_\_\_\_

AGENCY INVOLVED \_\_\_\_\_

OPPOSING COUNSEL(S) \_\_\_\_\_

ATTORNEY \_\_\_\_\_

ADDRESS \_\_\_\_\_

TELEPHONE \_\_\_\_\_ FAX \_\_\_\_\_

E-MAIL \_\_\_\_\_

CO-COUNSEL(S) \_\_\_\_\_

ATTORNEY \_\_\_\_\_

ADDRESS \_\_\_\_\_

TELEPHONE \_\_\_\_\_ FAX \_\_\_\_\_

E-MAIL \_\_\_\_\_

IF DECLINED CLIENT, HAS DECLINATION LETTER BEEN SENT? YES NO

CONFLICT CLEARED:

DATE: \_\_\_\_\_ SIGNATURE \_\_\_\_\_

**FINANCIAL INFORMATION**

ESTIMATE OF TOTAL FEES AND EXPENSES ON THE MATTER THROUGH COMPLETION \_\_\_\_\_

ESTIMATE OF AVERAGE MONTHLY FEES AND EXPENSES ON THE MATTER IN THE FIRST THREE MONTHS

TO BE BILLED: Monthly Quarterly On Completion

RETAINER: YES NO AMOUNT OF RETAINER \_\_\_\_\_

ATTACH COPY OF ENGAGEMENT LETTER.

EXPENSES FOR THIS CASE TO BE BILLED: GENERAL-001 SEPARATE

PRINCIPAL BUSINESS OF CLIENT:

FINANCIAL APPROVAL:

DATE: \_\_\_\_\_ SIGNATURE \_\_\_\_\_

- *Type of services provided.* The type and scope of services to be provided should be clearly defined. An engagement letter should describe the specific legal work to be performed by the firm in terms understandable by the client. If there are aspects of the matter that the firm is not handling, the letter needs to describe them as well. For example, if the firm is handling the documentation of a business purchase, but the client is arranging for the financing, the letter should so state.
- *Responsibilities of the attorney and client.* Areas of responsibility assumed by the firm and the client need to be described, as well as limitations on responsibility. In this section, the client should agree to provide the

firm with current information and to be available to assist the firm in preparing the matter as needed. The firm should describe how often and in what way it will communicate with the client. Important deadlines that require information from the client should be specified.

- *Fee arrangement.* Describe the fee arrangement in detail. If the firm has the right to value bill the client for an extraordinary outcome (or if certain benchmarks are achieved), specify those circumstances in this paragraph. If a retainer is required, specify the amount of the retainer, when it should be replenished, and how it will be applied. If the matter is contingency in nature, specify the percentage/rate that the attorney

and client have agreed upon. Address how client funds will be handled, including whether client retainers will be held in general or client trust accounts and whether or not interest will accrue and to whom it will go.

- *Costs and Disbursements.* This section of the letter should describe typical costs and disbursements that are likely to be incurred on the client's behalf. It should also include language about the firm's authorization to retain expert witnesses, co-counsel and consultants, as necessary. If the firm charges a flat monthly administrative fee (e.g. 5 percent) to cover the cost of faxes, postage, copying and telephone charges, it should be explained here.

With respect to externally generated costs (for example, court reporters and expert witnesses), the letter should describe when the firm will advance these costs, when it expects to be reimbursed by the client, and when costs will be passed on directly to the client for payment (for example, all hard costs over \$250).

- *Billing format, cycle and payment expectations.* If the fee is hourly, the hourly rates for attorneys, paralegals, and support staff in the firm working on the matter should be included as well as a description of how the firm bills (in minimum increments of a 10<sup>th</sup> of an hour, for example).

Describe the billing frequency — how often bills are sent and when the firm expects them to be paid. If the firm charges late fees or interest on unpaid bills over 30 days, include those terms here. If the matter is contingent, the client should be informed whether bills for costs will be sent during litigation or at the conclusion of the matter. Finally, if the firm reviews its billing rates annually and reserves the right to raise its rates during the pendency of a matter, include language to that effect.



- *Right to Withdraw.* Describe in this section the client's right to terminate representation. Include language to allow the firm to withdraw from representation of the client in the event of nonpayment of fees or lack of client cooperation, if ethically permissible.
- *Document Retention.* A provision should be included that describes the firm's document retention policy, indicates that documents belonging to the client will be returned at the termination of the matter, and specifies when the firm will dispose of records not belonging to the client (or what the client needs to do to obtain those records).
- *Arbitration.* Depending on the firm's preference, or as required by statute in some jurisdictions, inclusion of an arbitration provision in the event of a claim arising out of the agreement may be included.
- *When the engagement will end.* The agreement should describe when the engagement will terminate. For example, at the conclusion of trial, will the firm be responsible for handling an appeal? If not, the letter should clearly indicate this.
- *Binding provisions and execution by the parties.* The agreement should

include language which indicates the client has reviewed the agreement and acknowledges that it understands the terms and conditions of the firm's representation of it. Further, it should include a signature block for both the client and attorney

**After the Matter**

Just as there are rules of engagement, there are rules of disengagement. At the conclusion of the matter, send the client a file-closing letter. This letter can achieve many goals:

- to summarize what has transpired and remind the client of anything outstanding that the client has agreed to handle;
- to return documents belonging to the client; and
- as a marketing tool to thank the client and enclose an evaluation questionnaire to obtain feedback on how the firm could improve its services.

Proper documentation from inception to the conclusion of an engagement is key to establishing effective communication with the client as well as within the firm. Lawyers should, from time to time during the handling of a matter, refer to the engagement letter to make sure that they are meeting the

client's expectations and achieving the goals to which they mutually agreed. ❖

**About the Author**

**MARCIA WATSON WASSERMAN** IS PRESIDENT OF COMPREHENSIVE MANAGEMENT SOLUTIONS, INC., WHICH SPECIALIZES IN LAW PRACTICE MANAGEMENT AND HUMAN RESOURCES CONSULTING. SHE IS A PAST ALA BOARD MEMBER AND SERVES ON *LEGAL MANAGEMENT'S* EDITORIAL ADVISORY BOARD. REACH HER AT [MWASSERMAN@COMPREHENSIVEMGMT.COM](mailto:mwasserman@comprehensivemgmt.com).

**ARTICLE SYNOPSIS**

ONCE YOUR FIRM AGREES TO REPRESENT A NEW CLIENT, THERE'S STILL WORK TO BE DONE TO ENSURE THE NEW RELATIONSHIP WORKS FOR BOTH PARTIES. ONE TOOL ADMINISTRATORS CAN USE IS THE ENGAGEMENT LETTER. MAKE SURE YOUR ORGANIZATION'S BASES ARE COVERED — AND SEE SOME SAMPLE NEW-MATTER INTAKE FORMS.

**Learn More About It**

**On the Web**

- The following sources are available online:
- Documenting the Attorney-Client Relationship: Law Firm Policies on Engagement, Termination and Declination. Published by the ABA Committee on Law Firms. — [www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-12842&categoryId=-3578](http://www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-12842&categoryId=-3578)
  - Sample Attorney-Client Engagement Letter. Free forms on LawCommerce.com — [www.lawcommerce.com/info/free\\_forms.asp](http://www.lawcommerce.com/info/free_forms.asp)
  - "Five Key Provisions in Attorney Client Engagement Letters" by Richard D. Harroch — [www.lawcommerce.com/info/five\\_key\\_prov.asp](http://www.lawcommerce.com/info/five_key_prov.asp)
  - "Tax Link Live: What Engagement Letter?" audio program produced by ABA-CLE and the Section of Taxation, 2002. [www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-17999&categoryId=-3528](http://www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-17999&categoryId=-3528)
  - *The Essential Formbook, Volume I* by Anthony E. Davis and Gary A. Munneke — [www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-13590&categoryId=-3898](http://www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-13590&categoryId=-3898)

**From ALA**

- The following article appears in its entirety on ALA's site:
- "Risky Business: Risk Management Key for Effective Managers or Danger: Risk Management a Must in Litigious Times" by Billie Jo Harned — [www.alanet.org/members/solution/fax/40070.html](http://www.alanet.org/members/solution/fax/40070.html)