Rules of Engagement

Taking the Offense
When It Comes to Defense

By Stephen M. Terrell

Illustrations: Sean Kane

It's a scene played out every day in countless law offices across the country: A valued business client walks in to your office and recites how he has gotten into a dispute over his latest project. You ask, "Did you bring the contract with you?" A deadly, prolonged pause ensues. Sheepishly, the client lowers his head. In that instant, you know: He has no written contract. All those conferences about how important it is to put the terms of an agreement in writing have been ignored.

"Joe, you know how many times I've told you—get your contracts in writing. It's a lot cheaper to have a lawyer review a contract than it is to litigate a dispute."

"Will you still take the case?" Joe asks.

"Sure, Joe, I'll start work on it right away."

But wait—did you say "right away"? Where's the written contract? What happened to all those warnings about "handshake deals" and admonitions to "get it in writing" so there are no mistakes about the terms? What about that risk-management advice concerning the benefits of written contracts?

Physician, heal thyself!

Unfortunately, this scenario happens every day in solo and small firm law offices all across the country. Lawyers undertake representation with little more than an understanding and a handshake. As a group, we often fail to take our own oft-repeated advice to clients about formalizing our business relationships in writing. We should know better—and do better.

Engagement letters, nonengagement letters, letters of limited representation, and disengagement letters should be a fundamental and routine part of every lawyer's practice. They are a simple, effective, and inexpensive way to prevent misunderstandings with clients, mini-

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mize risks, and even enhance firm marketing. Like having an annual physical, we all know we should be doing it; we just don’t. But the limited time it takes to draft and utilize effective engagement, nonengagement, and disengagement letters may be the best work you do to manage your practice.

**Engagement Letters**

The engagement letter is the key to the attorney-client relationship. It is the contract that, along with the Rules of Professional Conduct, governs your relationship with your client. A well-drafted engagement letter sets out the specific responsibilities the lawyer undertakes, as well as the client’s obligations. It is invaluable in avoiding disputes with clients and, if conflict arises, becomes the key document by which the dispute will be resolved.

Ann Massie Nelson, director of communications for Wisconsin Lawyers Mutual Insurance Company, has reduced the function of the engagement letter to a mnemonic, ACCEPT. She recommends that the letter:

- **Acknowledge** who is the client. This means expressly identifying who the lawyer represents and, if appropriate, who the lawyer does not represent. (The latter often is more important when the issue does arise.)
- **Set the circumstances** of the employment, the specific matter for which the lawyer is being retained.
- **Establish the expectations**, what the lawyer is really agreeing to do.
- **Detail the payment** for services and the timing for payment. As all lawyers know, issues over billing and payment are frequently the flash point for lawyer-client disputes. Include the hourly fee for each attorney and paralegal, how any contingency fee will be calculated, and what expenses will be charged. The more details provided in the engagement letter, the less wiggle room for disputes to arise.
- Retainers may deserve special attention because they’re often confusing to clients. Are they applied to the first bill or the last? Are they used to pay ongoing fees, and do they need to be replenished each month to maintain a constant amount? These matters need to be spelled out.

Another essential is termination. Although the client may understand that she can fire the lawyer, circumstances under which the lawyer can fire the client need to be made clear. Of course, this provision should comply with applicable rules of professional conduct.

**Letters of Limited Representation**

Traditionally, clients have viewed solo and small firm lawyers personally, as “my lawyer.” This is one of the reasons why surveys consistently show that respondents hold the legal system in low regard but think highly of their own lawyers.

But the personal tradition is fading. According to Barrie Althoff, chief disciplinary counsel for the Washington State Bar Association, more clients are not looking for the full bundle of legal services and representation. In a series of articles in the bar’s newsletter, Althoff observes they are opting instead—at least at the outset—for limited representation. To a large extent, this trend is caused by the simple fact that many clients cannot afford full-service representation.

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**Where to Turn**


The ABA’s Law Practice Management Section (www.abanet.org/lpm) is a valuable resource for all types of information regarding your practice, including information on engagement letters. Various state bar associations also serve as resources for sample letters, for example, online links to bar materials from Georgia, Wisconsin, Washington, North Carolina, and Missouri. Check out their websites and archives of journal articles.

The Internet also is a rich source of materials. A Google or Yahoo search under “lawyer engagement letter” or a similar term will return a wide range of searchable sites and useful information.
Although this “unbundling” of legal services is permissible, it is full of pitfalls for the unwary lawyer. But Althoff emphasizes the “default” scope of representation, and unless the lawyer has specified a limitation on the representation, she will be held to the “full services” approach.

In order for a lawyer to limit representation to a specific matter or issue, the lawyer must comply with the applicable rules of professional conduct. Model Rule 1.2 permits the lawyer to limit representation provided that the lawyer consults with the client about the limited representation and that, after the consultation, the client consents to the limitation. Although putting the agreement in writing is not required by the rules, common sense and good practice suggest specifically setting forth the limits of representation in an engagement letter. The letter should identify the specific matter and services for which the lawyer is being retained and further specify that the lawyer is not being retained for any other purpose. Good practice would also require including a provision that any additional legal services would require a separate engagement letter.

Having set out the terms and limitations of the engagement, the lawyer must not stray from these terms. A lawyer who agrees only to provide certain services then goes on to provide broader representation may find herself “on the hook” for providing full legal services despite her engagement letter to the contrary. If your representation of the client begins to expand into new areas or matters, a new engagement letter for each area or matter is required.

**Nonengagement Letters**

Nonengagement letters are perhaps the most overlooked of all the letters establishing terms of employment—or, in this case, the terms of nonemployment. Whether through informal discussions at a cocktail party or formal consultation meetings in the office, lawyers are frequently asked to “just take a look at” a matter. If, after review, the lawyer decides not to take the case, what should be done? For many, the answer is nothing—just make a phone call saying thanks but no thanks. After all, you didn’t take the case, so why do more?

The answer, of course, is self-protection and risk management. According to Harvey L. Wendell, an attorney in Madison, Wisconsin, the absence of nonengagement letters often means firms have to compromise their fees or lose legal malpractice cases. Wendell strongly recommends that a nonengagement letter should be used any time a prospective client makes a request for legal service and the firm decides not to accept the employment. A mere oral response invites financial exposure to the firm.

The same thoughts are echoed by Chris Stiegemeyer, vice president for The Bar Plan insurance company. Stiegemeyer, who speaks nationally on risk manage-
ment for lawyers, strongly encourages the use of nonengagement letters. At a mini-
imum, he says, the letter should set out the nature and purpose of the meeting be-
 tween the prospective client and lawyer and assert that no representation was ac-
 cepted by the firm, the matter may be subject to a statute of limitations that could bar the person’s claim, and prospective counsel should seek another attorney or take other appropriate measures on its own behalf to protect their interests.

Stiegemeyer recommends against giving an opinion in a nonengagement let-
 ter as to when the statute of limitations will run. If the prediction is wrong, the firm could be exposed to a malpractice claim even though it never accepted employment. The one exception to this rule is when the statute of limitations will run in the immediate future. In these cases, Stiegemeyer recommends advising the potential client of the date for the running of the statute and documenting how that date was calculated (i.e., “Based on our brief meeting and not on any additional research or investigation by our firm, it appears your statute of limitations may run as soon as...”).

But even a nonengagement letter can be used as a business development tool. A friendly note at the end of the letter can advise the prospective client that your not taking the case does not mean you would not be interested in representing the client in other matters in the future.

Disengagement Letters

The attorney-client relationship can terminate for many reasons: The matter for which representation was needed is complete; the firm has discovered a conflict of interest; the client has not paid the bill or cooperated. Regardless of the reason, terminating the attorney-client relationship must be done with care. It also must be done in compliance with Rule 1:16, declining or terminating representation, as well as any applicable local court rules. These rules generally deal with protecting the client’s interests.

The importance of a well-crafted termina-
tion letter is emphasized by Hammond, Indiana, lawyer Melanie Dunajeski. She advises firm associates to imagine, before sending out a termination letter, the letter before them in a deposition with an exhibit sticker on it. This visual imagery brings home the care with which such a letter must be drafted.

Ann Massie Nelson summarizes the necessary content of a termination letter with the mnemonic PART, suggesting that every termination letter include the following sections:

- **Position:** Clearly state the position of the firm in terminating the employment.
- **Action:** Recite both the action taken to date by the lawyer and the actions the client needs to take. Recommendations from malpractice carriers are to be careful with statements about exact dates or deadlines because a misstatement can expose the lawyer to a malpractice claim. Of course the letter should encourage the now ex-client to seek other legal counsel as soon as possible.
- **Reason:** Clearly state the reason for the termination (“You have failed to pay legal fees as set forth in our engagement letter”).
- **Terms:** Address all outstanding legal fees and expenses and include a final bill.

### Notes

3. Id.