

E&O Edge

Lawyers Professional Liability Engagement / Non-Engagement Letters

Lawyers Risk Management Note: Many claims reported to us could have been avoided or minimized if the attorney had documented in writing the terms of his/her engagement or had documented the decision not to represent a particular client. Lawyers face risks from non-clients other than third party exposure associated with the representation of clients. One quick fix to reduce that risk is to consistently use Engagement and Non-Engagement (Declination) Letters.

Engagement Letters

Whenever your law firm accepts representation of a new client, engagement agreements should be used. A standardized agreement documenting the representation should include the following provisions at a minimum:

- **Identity of Client and Attorney:** This may sound obvious, but it can go a long way in preventing or resolving any potential misunderstandings. Further, in some cases, you may also need to specify whom you are not representing.
- **Scope of Services:** Clients may be involved in more than one claim. By specifying the matter for which your firm has been retained, you can avoid any potential claim that the client had hired you for other matters.
- **Right of Withdrawal:** Any engagement agreement should also spell out the attorney's right of withdrawal and should be signed by both the attorney and client.

- **Fee Arrangements:** Communicate the fee arrangement to the client, be it hourly fee, flat fee or contingency fee. If hourly or flat fee, clearly identify to the client the method and the frequency of billing. Also, assure that the client understands what out-of-pocket expenses will be passed on to the client.

Non-Engagement (Declination) Letters

A meeting with a prospective client that does not result in representation of that client should be followed with a letter of non-engagement. Without a non-engagement letter, the non-client can more easily claim an attorney-client relationship allegedly created during the initial interview and detrimental reliance thereon. The Non-Engagement letter provides the lawyer with a solid rebuttal to those allegations.

Non-engagement letters should be brief, but should always contain the following:

- **Statement of Declined Representation:** Any non-engagement letter should reference enough facts to identify the matter and should specifically decline representation although no specific statements regarding evaluation of the merits of the case should be made.
- **Time-Sensitive Date Caution:** Without calculating the exact dates involved, the non-engagement letter should alert the non-client that there may well be statutes of limitations or other imminent deadlines that could affect the non-client's right to pursue

the matter at hand. If the lawyer is overly specific relative to calculating such dates, she/he runs the risk that the non-client will later claim detrimental reliance on that statement in the event the deadline was inadvertently miscalculated.

- **Recommending Other Counsel:** Although specific referrals to other attorneys are risky, your non-engagement letter should always recommend that the non-client consult with another attorney about the case in question as soon as possible. Specific referrals are discouraged because of the potential for a "negligent referral" claim later if the successor attorney doesn't provide the desired result.

Also, don't forget **Disengagement** and **End of Matter** letters.

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This information is merely a guide and does not include all potential risk management practices and in no way should be considered a representation that, if the above tips are practiced consistently, there will not a claim made against you. The above information is necessarily high level and is based on generally recommended risk management practices and is not intended to be exhaustive or all-inclusive. It should, under no circumstances, be construed to constitute legal advice.