

Engagement Letters Can Reduce Malpractice Claims

By Anne E. Thar, Vice President and Corporate Counsel, ISBA MIC

Horror Story No. 1. Corporate Attorney receives a call from a long-time client, Loyal Manufacturing Company ("LMCo"). LMCo wants to sell two of its factories and use the proceeds to restructure its debt with Reliable Bank & Trust Co. ("Bank"). LMCo instructs Corporate Attorney to prepare the agreement for the sale and informs Corporate Attorney that the company will negotiate the debt restructuring itself. Because LMCo has been a client for over 20 years, Corporate Attorney does not feel it is necessary to send an engagement letter regarding the new project.

At the client's request, Corporate Attorney attends one meeting with LMCo and Bank to review the terms of the sale. Corporate Attorney then drafts the buy/sell agreement and the sale of the factories is completed without incident. Unfortunately, LMCo and Bank cannot work out a mutually satisfactory restructuring of LMCo's debt and LMCo is financially crippled as a result. Faced with a choice of losing its business or suing its attorney, LMCo takes the latter option and sues Corporate Attorney for improperly handling the renegotiation of Company's debt.

Horror Story No. 2. Mr. B. Bunny ("Bugs") is injured at work while driving a forklift for his employer, Acme Trucking Company. Attorney E. Fudd agrees to represent Bugs in his workers' compensation claim against Acme and has Bugs sign the standard attorney representation agreement required by the Illinois Industrial Commission. Thereafter, Fudd obtains a \$25,000 settlement on Bugs' behalf. After talking with a few friends at a cocktail party, Bugs asks Fudd about the possibility of bringing



If you still think engagement letters aren't necessary, read on.

a product liability claim against the forklift manufacturer, Warner Sisters. Bugs discovers to his horror that the statute of limitations has expired. Bugs then sues Attorney Fudd claiming that Fudd should have filed the products liability complaint on Bugs' behalf.

The claims described above could have been avoided if the attorneys in question had documented the parameters of the attorney-client relationship in writing. In general, attorneys who bill on an hourly basis send engagement letters, while attorneys who work on a contingency fee basis use written fee agreements. The reason for this distinction can be found in the Illinois Rules of Professional Conduct. The Rules require attorneys who work on a contingency fee basis to document the arrangement by agreement, while attorneys who earn other types of fees are only required to "communicate" the fee arrangement to the client within a reasonable time

after commencing the representation. Engagement letters satisfy that requirement.

Consider the following rules when establishing engagement letter procedures in your office:

1. Define the scope of the representation. The engagement letter should concisely describe the legal work to be performed by the attorney. Furthermore, if there are key aspects of the matter for which you are not responsible, the engagement letter should contain a clear statement to that effect. For example, Corporate Attorney should have sent an engagement letter to LMCo stating that Corporate Attorney would prepare the buy/sell agreement and other closing documents for the sale of the factories and that LMCo would be solely responsible for renegotiating its loans with Bank.

For his part, Attorney Fudd should have added the following language to his engagement letter:

It is further agreed and understood that this agreement is only for representation of the client by Attorney Fudd in regard to the client's workers' compensation claim. Attorney Fudd has not been retained to represent the client for any other claim and Attorney Fudd will not pursue or investigate any other potential claim unless and until the client and Attorney Fudd enter into a separate agreement.

(This language can be added to the bottom of the required attorney's representation agreement.)

2. Identify the client. This may not be as easy as it seems. For example, if you are dealing with a corporate entity, is your client the board of directors, a majority shareholder, the CEO, the parent corporation, or a subsidiary? If there is any question about the client's identity, make sure that

the letter clearly states the client's name and does not simply refer to "you."

3. Describe the fee arrangement in detail. The agreement or letter must describe in detail (a) the fee to be paid for the legal services in question, (b) when it must be paid, (c) any expenses for which the client will be responsible, and (d) any referral fee or fee-splitting arrangements. Remember that the client must agree to any fee-splitting arrangements in writing and must be notified of any referral fees.

4. Don't forget to use engagement letters when you undertake new matters for existing clients. Horror Story No. 1. is a prime example. If you are uncomfortable sending a formal letter to a long-time client, you can draft a more casual letter that accomplishes

the same goals:

It was a pleasure speaking with you today regarding the sale of your factories. As we discussed, our firm will handle the buy/sell agreement on behalf of LMCo and LMCo will handle all aspects of the debt restructuring. As usual, we will bill you on a monthly basis at our then-current hourly rates. A copy of our current rates is attached.

5. The engagement letter should not only define when the representation will begin but when it will end. For example, the letter should state whether or not you will be responsible for appeals. In addition, it is strongly recommended that attorneys send closing letters that notify clients that the representation has ended and remind them of any clean-up matters that are their responsibility.

There are hundreds of sample engagement letters available to attorneys. Check your local law library or ask a colleague for a sample. Bar associations also are a good source for samples. Many specialty bar organizations prepare engagement letters and other sample legal documents for their members. After you have collected a few, you can tailor them to your practice.

Each attorney-client relationship should begin with a meeting of the minds between the client and the attorney about the services to be rendered and the fee to be paid. By routinely using engagement letters you can start the relationship on a strong footing and avoid misunderstandings that may lead to malpractice claims.