Retooling the Client Engagement Letter to Minimize Liability Claim Exposure

PLUS Blog
Posted on March 23, 2023, by plushq
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Attorneys eager to solidify relationships with new clients, or excited to land a piece of developing business, should pause for a moment's forethought before rushing to prepare the latest client engagement letter. Each new engagement offers opportunity to revise and strengthen provisions that could provide better preventive protection against possible malpractice claims. Adjustments to standard provisions could provide greater clarity as to the scope of the relationship between lawyer and client, the particular services being offered, and the limits to both. This is particularly true for letters being sent to new clients or that focus on a new area of business development. Slightly retooling the following common provisions included within most client engagement letters would provide all practitioners with greater protection against malpractice claims.

A thorough client engagement letter includes provisions that: 1) define the attorney-client relationship; 2) set forth the specific scope of services; 2) identify the applicable fees and payment terms; 4) address potential conflicts of interest; and 5) establish a framework for communication between client and attorney (or client and the attorney's staff or firm). These letters are tailored to a practice area and molded by attorneys' preferences. Despite the variety in their presentation due to practice types and purpose, all engagement letters should share one common goal – to set forth clear expectations and boundaries for both the attorney and client as to the engagement.

Protection against potential malpractice claims can be found in adjusting the following provisions of the engagement correspondence to strengthen the boundaries that set forth the outer limit of a lawyer's representtation.

Limiting Language in the Client Identification Provision

Lawyers should consider the benefit of both expressly identifying the client and expressly identifying who is not the client.

Attorneys often focus on the relationship between themselves and the person or entity that they are representing. This focus is then reflected in the client engagement letter. But what about situations in which a lawyer represents one among many? Or a particular employee of a company? Or the company vs. the Board of Directors? Many malpractice defenses are predicated on the assertion that no attorney-client relationship existed between the plaintiff and the defendant. This defense would be considerably strengthened at the outset if the provision defining the attorney-client relationship included both positive and limiting language.

For example, contrast "I am representing Company XYZ in the defense of this claim." with "I am representing Company XYZ in the defense of this claim. This representation does not extend to Company XYZ's wholly-owned subsidiaries, executive officers, or Board of Directors." The inclusion of this simple, limiting language provides a clear boundary to the client as to the scope of the representation, and avoids confusion. Should a future malpractice claim predicated on the scope of representation arise, the language and the engagement letter itself acts as the cornerstone for a malpractice defense.

If a defense is being provided pursuant to insurance coverage, this limiting language also provides the opportunity for an insurance defense attorney to introduce a necessary insurance coverage discussion into the engagement letter. "I am representing Company XYZ in the defense of this claim. This representation does not extend to Company XYZ's wholly-owned subsidiaries, executive officers, or Board of Directors. Should these entities or individuals be named as defendants, a separate discussion and inquiry into their insurance status must be held between yourselves and your insurance provider."

Final Payment Provision

Lawyers providing distinct services – such as the administration of an estate or representation in a particular legal dispute – should consider the benefits of including the final payment framework in their engagement correspondence. A final payment provision obviously ensures that lawyers receive payment for their hard work. But it can do so much more. It can provide additional support for a defense against a malpractice claim based upon a plaintiff's incorrect assertion of an overly-broad understanding of the services originally undertaken by the attorney.

A final payment provision can include the timeline for when a lawyer will close their file and conclude their representation. Language indicating that file closures will occur within thirty days of processing of final payment can be the companion bookend to the scope of services provision. Any ambiguity about which duties were expressly undertaken by an attorney can be examined in the context of one document – with the scope of services being the narrative description, and the letter itself and the final payment provision providing the timeline of the attorney-client relationship.

Additionally, the language of a final payment term can directly link to the scope of services description. Tying the timeline for final payment or linking the procedural steps for final payment to the conclusion of services being provided, such as the closing of a docket or final approval of a bankruptcy proceeding, can highlight the total universe of services provided by the attorney.

Finally, a final payment provision can help prevent disputes over fees. If the lawyer and client do not agree on the fees owed, it can create a dispute that may be difficult to resolve. By including a final payment provision in the engagement letter, the fees are clearly defined and agreed upon in advance, which can help prevent disputes and misunderstandings.

Disengagement Provision

Nobody wants to contemplate the ending of a business relationship, particularly when it's just beginning! But attorneys must consider the potential protection afforded by includ-

ing an explicit disengagement provision in the engagement letter. The importance of a disengagement term and the framework it sets forth cannot be overstated as a mechanism to wrap up an attorney-client relationship before a malpractice claim arises.

Without a clear understanding of when and how the attorney-client relationship may be terminated, both the attorney and the client may be left in a difficult and uncertain position. By including a disengagement term in the original engagement letter, attorneys can protect themselves from unexpected liabilities that could arise from interactions with difficult clients. How many attorney and client disputes arose from relationships that began to fracture during the course of representation but before any action upon which a malpractice claim could be based? Having the ability to disengage from a potentially fractious relationship would go a long way to reduce future headaches.

In addition to protecting the attorney, a disengagement term can also be beneficial for the client. Clients may have concerns about the quality of an attorney's work or the direction of their case, and a disengagement term can give them the peace of mind of knowing that they can terminate the relationship if necessary. This can be pointed to in future proceedings.

Simple adjustments to an engagement letter can provide protective boundaries for both sides of the attorney client relationship. Such retooling can minimize malpractice liability and significantly limit the occurrence of the common claims that malpractice defense litigators often encounter.

https://plusblog.org/2023/03/23/retooling-the-client-engagement-letter-to-minimize-liability-claim-exposure/

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