

Leave a Paper Trail for Good Client Communications

Consider this: Complaints to the OSB Client Assistance Office are most frequently from the lawyer's own clients, and the most frequent complaint is about their lawyer's lack of action and communication. Many malpractice claims also could have been avoided with better client communication. Avoid misunderstandings through the effective use of nonengagement, engagement, and disengagement letters.

Nonengagement Letters

Let's look at the least popular, but arguably most important one – the nonengagement letter. You might think, "Why waste time sending a letter to someone you don't intend to bill or represent?" First, a clear nonengagement letter helps protect you from acquiring "accidental" clients. You might be surprised to find that your chat with a prospective client about the "possibility" of your taking the case resulted in the prospective client assuming you are his or her lawyer. Remember, Oregon's standard for the formation of the attorney-client relationship is whether the client's subjective belief that the lawyer is representing the client is objectively reasonable under the circumstances. Craft that nonengagement letter so that you leave no doubt in the person's mind as to his or her status as a non-client.

Second, even if you do not form an attorney-client relationship, prospective clients are subject to the conflict-of-interest rules. Sending a nonengagement letter to a declined client should prompt you to enter the person in your conflicts system – making it easier to notice this person's name when you run a conflicts search.

A nonengagement letter makes the relation-

ship with prospective clients clear: either (a) you will not consider them a current client until you provide them with an engagement/fee agreement letter that they must sign and return with the retainer; or (b) you will not be able to represent them because your research indicates that the facts do not warrant a claim; or (c) you are still waiting for further information needed to evaluate whether you can take the case.

Example: A lawyer met with a prospective client and explained that he would need to review documents of the prospective client prior to accepting the case. The prospective client didn't get back to the lawyer. The lawyer assumed that the prospective client didn't want to proceed. The lawyer was later notified that his "client" had filed a malpractice claim for missing a statute of limitations. There was no documentation of the prospective client meeting and no letter of nonengagement to help defend the lawyer.

A well-written nonengagement letter need not be time-consuming. A couple of points to include:

1. Notification that the case may be subject to a time limit and it is important to retain another lawyer. If you don't know enough about the facts of the case to be specific about the time deadlines, be general. If you are sure of impending statutes of limitation or court deadlines for procedural docket items like answers or responses, specify them but also indicate that these may not be the only deadlines that apply.

2. Other resources such as the OSB Lawyer Referral Service or the name of other lawyers who may be able to help. Caveat: It is best to give two or three names of other practitioners so that

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you don't appear to be endorsing another attorney, thereby setting yourself up for a claim of negligent referral.

Practice Tip: You will find sample nonengagement letters on the PLF's Web site under Loss Prevention – Practice Aids and Forms – Nonengagement Letters.

Engagement Letters

If there is to be an attorney-client relationship, be sure it gets off to a good start with a clearly written engagement letter. It formalizes the attorney-client relationship and tends to encourage other best practices, such as entering parties into your conflict-of-interest and calendaring systems. The engagement letter is often overlooked because the lawyer is in a hurry to commence representing the client. Not having an engagement letter in the file makes it very difficult to respond to an ethics complaint, defend a malpractice claim, or collect your fees.

If the new engagement is with an existing client, it is easy and tempting to take a more casual approach. Unfortunately, it is also easy to overlook details. When you have an additional matter with the same client, open a new matter and confirm your understanding of the scope of representation and fees. Modify your engagement letter to become a confirmation of understanding. It can be friendly, but put your understanding in writing.

Example: An attorney took a client from the OSB Lawyer Referral Service but never sent an engagement letter. The client felt the lawyer was overcharging for work the client didn't authorize and refused to pay the invoice. Instead of working it out with the attorney, the client complained to the Department of Justice (DOJ) Consumer Fraud Division. The lawyer died before the complaint was processed. There was no engagement letter in the file, though the deceased lawyer's spouse knew the work had been done for the client. The DOJ dropped the investigation because the lawyer was deceased; however, the lawyer's spouse chose not to pursue the outstanding bill. The only money received from the client was the initial consultation fee under the terms of the Lawyer Referral program: \$35 or less.

Use an engagement letter to explain to your client what you will do on the client's behalf. This letter generally summarizes the initial interview. Confirm your agreement to represent the client and the financial terms for providing those services. Delineate the scope of representation, stating when it will begin and giving a clear explanation of what you will do and what the client is expected to do. Detail your client's obligations to keep you informed about current contact information, changes in the facts of the case, or any new developments.

Your engagement letter can also explain your office procedures and policies for billing, providing case updates, returning phone calls and e-mails, and file storage and eventual destruction, as well as provisions you have made for emergency practice closure should you become disabled or die before representation is concluded. (See the PLF handbook, *A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death* on the PLF Web site under PLF Publications. These forms are also available under the Practice Aids and Forms category: Closing Your Law Practice.)

Is there a conflict-of-interest issue that needs to be disclosed and do signed waivers need to be received? This issue must be addressed before accepting the new client. You may want to provide the prospective client with a conflict disclosure and waiver letter and an engagement letter at the same time. (See the PLF Practice Aids Conflict Letters under the Conflicts of Interest category of Practice Aids and Forms.)

Practice Tip: You will find sample engagement letters on the PLF's Web site under Loss Prevention – Practice Aids and Forms – Engagement Letters.

Disengagement Letters

All clients should receive a disengagement letter when you end your representation – whether it is in the middle of the legal matter or at the conclusion. Not wanting to waste more time dealing with a client you no longer wish to represent is understandable. However, the time and effort involved in sending a disengagement letter are far less than the time and anxiety involved in defending an ethics complaint or a malpractice claim.

A disengagement letter allows you to communicate that the attorney-client relationship has ended and that the client is now a former client. This status is very important for conflict-of-interest purposes, since the duties owed to a former client are less than those owed to a current client. A disengagement letter is especially critical if you decide not to continue in a case until completion.

Example: The attorney grew increasingly frustrated that the client was not returning calls promptly and had not paid the last two monthly invoices for services, despite her earlier warning to the client that she would terminate the relationship if calls were not returned and invoices were not paid. The attorney realized that she had grounds to terminate representation under ORPC 1.15(a)(5) because the client was substantially failing to fulfill an obligation to the lawyer and had been given reasonable warning that the lawyer would withdraw unless the obligation was fulfilled. The attorney called and told the client she was not

going to continue representing the client. She did not send a disengagement letter. The client paid the invoice and left a couple of voicemail messages asking the attorney to call him back. The attorney did not return the calls. The client later complained to the OSB Client Assistance Office that the lawyer was neglecting his case.

In a disengagement letter, make clear that the attorney-client relationship is terminated – either the matter is concluded or you are discontinuing your representation. Refer the client to other attorneys, if appropriate. The prudent lawyer will warn the client of applicable time limitations, deadlines, and any uncompleted case work and state whether the client owes fees and expenses under the fee agreement. If you are sending the disengagement letter at the successful conclusion of the legal work, take the opportunity to seek feedback about the client's experience of the representation and service provided.

Practice Tip: You will find sample disengagement letters on the PLF Web site under Loss Prevention – Practice Aids and Forms – Disengagement Letters.

Nonengagement, engagement, and disengagement letters exist for your protection. Instead of viewing them as bothersome paperwork, treat them as the crucial safeguards they are. The paper trail you create today becomes a record you may need tomorrow to defend yourself in an ethics complaint or a malpractice claim.

SHEILA BLACKFORD
PLF PRACTICE MANAGEMENT ADVISOR

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