

Non-Engaging, Engaging, and Disengaging Clients

by Lawrence J. Fox

Assistant: *Ms. Adams, there is a Lilly Pennywhite on the phone to talk to you.*

Ms. Adams: Did she say what she wants?

Assistant: *No, but the name sounds familiar.*

Ms. Adams: Gosh, I don't remember it.

....

Ms. Adams: Hello, Ms. Pennywhite.

Lilly Pennywhite: *Ms. Adams, so glad I could reach you. It's been two months, and I just wanted to know how my case is going.*

Ms. Adams: Your case?

Lilly Pennywhite: *Yes, the medical malpractice case. Remember the doctor operated on my hip, and it is still giving me terrible trouble.*

Ms. Adams: Oh, I remember. We met in one of our conference rooms. I am not handling your case. I remember telling you that we didn't do medical malpractice.

Lilly Pennywhite: *Oh, you said something like that, but then you said you were going to chat with one of your partners and would get back to me. I just assumed you were handling my matter when I didn't hear from you.*

Ms. Adams: Now, now, Ms. Pennywhite, I am sure that we didn't take your case. When did you say this happened?

Lilly Pennywhite: *Oh, it was two years ago last Thursday. I remember noting the date because the pain is worse than it ever was.*

Ms. Adams: Two years and a little bit you say?

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Should one start an article about engagement letters for trial lawyers with such a dismal and depressing dialogue? Actually, this is precisely where such an article should begin. While we all delight in bringing in new matters and certainly must learn the importance of an engagement letter to a successful representation, there is a far less lucrative but equally important aspect of a lawyer's practice that we must address. Indeed, it is crucial to remember to send *non-engagement letters* when we decide not to take on a matter; letters that inform the prospective client—in no uncertain terms—that we are not going to handle the matter we discussed. And, if there is a statute of limitations, we must inform the prospective client in very clear language that if she decides to pursue the matter further, she must do so promptly because her rights could easily be extinguished by the passage of time.

Why such concern? Because no one is videotaping your conversation with the prospective client. Memories fade or become conveniently distorted. And when it later comes to a contest between the prospective client and the lawyer, the former's memory is more likely to prevail, if for no other reason than the power imbalance between lawyer and prospective client, often buttressed by the testimony of some pointy-headed expert who opines that it was the obligation of the lawyer to clarify the situation.

In addition, the non-engagement letter gives the lawyer the opportunity to make it clear that no advice was rendered to the prospective client and that the prospective client, therefore, should not rely on anything the lawyer said during the conversation. Or, if advice was given, for example that the statute of limitations for this type of claim is two years from the date of the accident and, therefore, the prospective client must proceed in a manner consistent with not permitting that time to elapse, then the advice (which, of course, must be correct) is reduced to a clear writing lest the substance of the conversation be misremembered later.

A good non-engagement letter, which is best sent with a return receipt requested, might read something like the following.

Dear Prospective Client:

I enjoyed our chance to meet today. As I explained, our firm will not undertake the matter you presented to us. In reaching that conclusion, we want to emphasize that we have not researched your matter and, therefore, have no opinion on the merits of your claim. Nonetheless, we hasten to remind you that if you are going to pursue the matter further, you should do so promptly because many legal rights get compromised or extinguished by the passage of time. [I recommend you contact (local bar referral service or _____) if you wish to contact another lawyer.]

Very truly yours,

Martyn & Fox

But what if you decide to take the matter? You might think engagement letters are required. Except in the case of contingent fee arrangements, most jurisdictions impose no such requirement. This omission may be because the ABA Model Rules do not require such a letter. Indeed, the ABA House of Delegates rejected a requirement when one was proposed in 2002 by the Ethics 2000 Commission as part of its comprehensive review of the rules. It remains, however, a fundamental “base practice” that every lawyer should take the trouble to write such a letter every time there is a new engagement.

So the real question is what should such a letter contain, because it is possible, just possible, that the lawyer can create more mischief for the client relationship in writing the wrong letter than would arise if no letter were sent at all. To proceed in what may appear to be an upside-down fashion, let us first examine a letter that tells us, not what to include but, rather, what to avoid at all costs. The following mythical engagement epistle will help demonstrate the point.

Dear Client:

We really enjoyed meeting you today and the chance we had to describe to you our firm’s capabilities and special expertise in so many different areas of the law. We plan to become your outside general counsel and look forward to fulfilling all your legal needs. We want you to know how much we value your retention of our firm.

It is our plan to provide our service to you at our normal hourly rates. In addition, we will handle expenses and disbursements, for which you are responsible, in our usual way.

We know your faith in hiring our firm will be rewarded with excellent results.

Sincerely,

Martyn & Fox

Isn’t that a wonderful engagement letter? So short. So

friendly. So impressive. And so fraught with disaster. Which does not mean it cannot help us learn (a) the importance of an engagement letter; and (b) what an effective engagement letter should contain.

Our firm’s business development department may love this letter. How splendid it would be to turn an engagement to act as local counsel for the serving of a subpoena and the providing of a conference room into a full-fledged cross-selling opportunity. But the problem with this expansive approach should be apparent. The engagement letter is no opportunity for taking on any more responsibility for the client’s matters than the client has requested. Indeed, it is essential that the engagement letter define with precision the scope of the engagement. That way there is no misunderstanding as to what your responsibilities are and to whom you owe them.

If you are only acting as local counsel, it should say that. If you are only handling an appeal to an intermediate appellate court, it should state that. If you are going to become national coordinating counsel for dozens of product liability suits, it should say that. But, unless you are going to become outside general counsel (and, perhaps, even if you are), you should err on the side of a narrow definition of what you are undertaking, lest you find yourself on the wrong end of a malpractice suit for failing to notify the corporate client regarding new ERISA regulations or changes in the Internal Revenue Code.

There is one important caveat to this recommendation that the scope of the representation be defined narrowly. While the rules permit the client to define the scope, it is impermissible for the lawyer to accept a scope limitation that will render it impossible or unlikely that the lawyer will be able to deliver competent services. Examples could include being asked to act as local counsel, but not being allowed to spend enough hours to permit you to fulfill your obligations as an officer of the court to review carefully what is being filed. Or being asked to prepare a summary judgment motion in no more than 50 hours. Or to take a corporate employee to a deposition without any time permitted for witness preparation. In each of those cases, and myriad others, the ethical lawyer must either get the limitation modified (despite the desire to please the parsimonious client) or withdraw from the representation (to the dismay of your colleagues) on the ground that continuing the representation is likely to result in a violation of the rules of professional conduct.

This communication contains another important lesson. The engagement letter is no place to brag about how good your firm is at what it does. Claiming that you have special expertise, while causing you to break your arm patting yourself on the back, also could establish a higher or specialist standard of care than might otherwise apply to the services you are about to provide. It is bad enough that law firm literature, either printed or on websites, often includes general self-congratulatory statements about the firm’s excellence. Putting such language in a document proclaiming that your expertise has become the contractual standard makes it impossible to argue this was mere marketing exuberance of no evidentiary significance in litigation. A good engagement letter should tell the client who will staff the case, but anointing these mere lawyers with over-the-top descriptions of their “super-lawyer” status can only come back to haunt the firm.

Similarly troubling, this engagement letter promises results. Though we undertake each new engagement in the hopes that the engagement road will lead to a destination called success,

we all know the vagaries of any matter. The negotiations will fail, the case will be dismissed on a technicality, a key witness will recant, and the jury goes where no reasonable jury was expected to go. Even our transaction brothers and sisters should never promise results. A fortiori, trial lawyers should, if anything, downplay the likelihood of triumph in conversations and not address the issue at all in the context of an engagement letter.

More lessons about engagement letters can be learned from what is omitted from this letter. First is the subject that makes our hearts leap—fees, glorious fees. We love them; we could not open our offices each day without them; we would never be able to fund life's little luxuries if they disappeared. But like another topic we love, we do not want to talk about it. Keeping our personal lives private is, of course, perfectly proper, indeed a goal quite likely to receive universal approbation. Fees are different. They must be discussed openly, frankly, and completely so that the prospective client understands fully how we plan to charge for the matter. Is it hourly? Contingent? Fixed? What are the rates, the percentage or the amount? So if the client asks in a face-to-face meeting, this is no time to lose one's stentorian voice, cover one's mouth with one's hand, and mumble something barely audible. And if we are conveying this information via the engagement letter, full and frank disclosure of this information must be the standard, not some vague reference to normal hourly rates that leaves the prospective client essentially uninformed. Otherwise, if there is a fee dispute later, you can be sure the failure to write with clarity on the topic will be viewed dimly by any fact finder. As a result, a large fee, well earned, may be the casualty of the lawyer's failure to be forthcoming at the commencement of the engagement about the basis for the fee, including how increases in rates will be handled.

The same problem applies to the failure to address the bases on which the client will be charged for costs and expenses. A widely accepted American Bar Association Ethics Committee opinion (Formal Opinion 93-379) makes it quite clear that lawyers are required to inform their clients how charges for such items as photocopying, faxes, and messengers are to be handled and that, if lawyers do not want to engage in elaborate cost accounting to avoid turning services into undisclosed profit centers, they have to establish a catalog of reasonable charges (10 cents per page for photocopying; a dollar per page for faxes) and present that information to the client at the beginning of the engagement. That information is, of course, totally absent in the "model" letter set forth above.

Having eviscerated the "model" in the name of providing sound advice, let me complete the exegesis on engagement letters by affirmatively explaining what else should be included.

First—and this may sound so obvious as to leave the reader wondering why I mention it at all—make sure your engagement letter not only identifies the client but also defines who is *not* the client. This is an easy exercise in the case of an individual, but one that can quickly spin out of control in almost every other context. With respect to a couple that showed up for an appointment, is the spouse also a client? She may have a similar claim or have an interest different from her husband's that must be addressed. And if the client is an organization, the likelihood is that individual officers or employees of the organization may be viewing you (mistakenly) as their counsel. Though this concern reaches its most critical level in the close family corporation, the issue can arise even among the

most sophisticated officials of our largest companies. Indeed, this is a result that all of us foster because any time we represent a legal fiction we refer to the fiction's constituents as our client. Just think about the last time you introduced a chief executive officer as "my favorite client," or you invited your "client," the chairman of the board of the university, to a member-guest tournament, or put the client's vice president for human resources on your firm's client mailing list. One of lawyers' greatest fears should be acquiring what has often been referred to as "accidental clients." One way to avoid that issue is to be explicit in the engagement letter as to who is being represented and, equally important, who is not, though the latter issue is handled effectively only if the "not represented" party receives the letter. Otherwise, the lawyer must undertake a separate communication to the unrepresented party to address that issue.

Second, protect yourself by making it clear what obligations you expect from the client. This could include the responsibility to cooperate with discovery, make witnesses available, pay for experts, and other similar assistance. Most important, this is the place to make clear that the client's obligation is to pay any fees on a prompt basis and to explain the consequences of the client's failure to do so. You must do this because the rules of professional conduct governing a lawyer's right to withdraw provide, as a permissive ground for withdrawal, the failure of the client to fulfill an obligation of the representation. This ground for withdrawal, however, does not necessarily capture the client's failure to pay bills. Inserting into your engagement letter your dim view of non-payment and your intent to seek termination of the representation if the client fails to pay invoices for professional services promptly, while hardly dispositive, gives you a better argument to the court, from which you must seek permission to withdraw under Model Rule 1.16(c) than if this topic went unaddressed.

Third, the engagement letter is an excellent opportunity to address issues relating to confidentiality. It can be as simple as a reminder that you will be fulfilling your obligation to the client to keep matters confidential. But if this is a joint representation, it also must address—far more importantly—how confidential information will be handled. In joint representations, good practice requires the lawyer to explain to the clients how she will handle a situation in which one of the clients shares information that the other joint clients would love to know, but that, if it were received through the lawyer, would in some ways damage the interests of the disclosing client. The lawyer should explain in the engagement letter either that confidential information *will* be shared with all clients or that it *will not* be shared so that everyone knows what to expect. If the lawyer takes the latter approach, she should also explain that should she become aware of confidential information that creates a conflict of interest, she will then withdraw from the representation without disclosing the basis for the withdrawal. Setting these ground rules is important because in the absence of such ground rules, the lawyer must rely on the applicable jurisdiction's default rules for such collar-tightening situations, and those default rules are not always clear.

Fourth, if undertaking this representation required addressing a conflict of interest and seeking a waiver, the engagement letter is an excellent place for the lawyer to fulfill what is an obligation under the rules of professional conduct. This obligation requires a lawyer to confirm in writing any waiver of a conflict of interest by the client. See Rule 1.0(e). Though

the rule seems to require no more than mere confirmation of the waiver, the lawyer and client are well served if the letter also explains the basis on which the lawyer received informed consent from the client. Rule 1.7(b). The letter could recount the discussion, remind the client that the client was given the opportunity not to waive, and describe in some detail the discussion with the client regarding the risks of waiving the conflict before the client was asked to waive.

Fifth, the engagement letter is a perfect place to explain to the client the manner in which you plan to staff the matter and to introduce the lawyer or lawyers, as well as any paralegals, who will be working with you on the matter. This not only informs the client of the people who will be involved in the matter but also gives the client someone else to contact about the case when you are not available. It also conveys to the client your expectations as to the scope of services you will be providing. Identifying one associate says one thing; identifying five associates and three paralegals says something else, something quite different.

Sixth, in some jurisdictions, there is a requirement that the lawyer agree in the engagement letter to a certain method of dispute resolution should a dispute arise between client and lawyer. Even where not required, it could make good sense to put into the engagement letter an agreement between you and the client to mediate any disputes and, perhaps, even to arbitrate, rather than litigate in court, matters that arise between the two of you. Such an agreement may not be enforceable at the end of the day, but it gives the lawyer an excellent argument for keeping such disputes out of the court system.

This checklist should provide you with a quick reminder of the topics your engagement letter should address:

- identification of the client and related parties;
- identification of the goals of the representation;
- definition of the scope of the engagement;
- description of the respective responsibilities of the client and the lawyer;
- methods of communication;
- proposed staffing, including agents of the client and lawyer;
- fee terms and billing schedule (including any outsourcing and how it will be accounted for, and how expenses and disbursements will be charged);
- resolution of confidentiality issues, especially in multiple representations;
- identification and consents to conflicts of interest;
- grounds for withdrawal or termination;
- policy on file retention; and
- methods of dispute resolution between client and lawyer.

See Susan J. Martyn and Lawrence J. Fox, *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility* 81 (Aspen 2004).

It is equally important to consider disengagement letters, which should be written at the end of a representation. In some ways, this topic is the most difficult one for lawyers to address. At the completion of every representation, our hopes are that the client will come back to us when the client needs additional legal services. Indeed, we know that some significant percentage of new work in every law firm comes from existing or former clients of the firm. And how often have we been exhorted by our business development gurus that we should be cross-selling other firm services to our existing and former clients? So the

thing we do not want to do is send a “Dear John” letter to our client that leaves the client feeling scorned, rejected, and likely to go elsewhere the next time he needs a lawyer.

On the other hand, if we do not send the client some communication that advises the client that the representation is at an end, we run the very real risk that the client will believe that we have some continuing duties to him, perhaps to update the client on developments in closely related areas of the law, or with respect to future obligations of the client under that terrific settlement agreement we were so successful in negotiating. Moreover, this misapprehension by the client that we are still the client’s lawyer inevitably will be reinforced when we put this former client on a firm mailing list to receive client alerts and other broad-sided communications sent out by the law firm from time to time, often addressed “Dear Client” or otherwise presented in a way that would lead the former client to believe that there is an ongoing relationship.

Protect yourself by making it clear what obligations you expect from the client.

If we do not formally tell the client that he or she has been transformed into a former client, we run the higher risk that the now former client will continue to have a reasonable belief that he is a current client. This means that some court is more likely to decide that because the client is a present client, we cannot take a position directly adverse to that client without client consent, even on matters totally unrelated to matters handled for the “former” client. Nor, again without client consent, may we take on a matter in which the fact that this person or entity is viewed by a court as a present client creates a “material limitation” on the next new matter we bring in. But if this client has become a former client, the applicable rule of professional conduct is Rule 1.9, and you may take on a matter adverse to this former client so long as the new matter you undertake is not the same or substantially related to the matter or matters you handled for the former client and does not implicate the confidential information of the former client through potential use or disclosure.

Under these ambiguous circumstances, not sending some closing communication carries real risk. As a result, the lawyer who has completed an engagement and wishes to turn the present client into a former client should send a carefully crafted letter that does the very best job of addressing this approach-avoidance dilemma. Perhaps the following letter, although quite hedged, captures the essence of what might be included in such a communication.

Dear Client:

We were pleased to provide services to you in connection with the recent contract dispute between “X” and you. We hope you are pleased with the results. This matter is now concluded, and we will either maintain the file in our dead file warehouse or send it to you, at your discretion. This concludes our present work for you. Should

you have a need for legal services in the future, we hope you will again contact our firm.

Very truly yours,

Martyn & Fox

Trial lawyers love to snare new clients. And they love to serve clients with the very best of zealous representation. What they do not necessarily love is those nagging administrative details. But you, as an ethical and conscientious lawyer, should make sure that all clients, former clients, and non-clients understand the relationship they have, had, or don't have with you. Engagement letters provide an excellent foundation for a successful lawyer-client relationship and, just as importantly, reduce the risks that often arise in a trial lawyer's professional environment. □