

SPECIAL REPORT: WHAT ENGAGEMENT LETTER? AND WHAT SHOULD IT SAY?

INTRODUCTION: In this Special Report, Aen Webster and Paul Van Horn explore the engagement letter in the context of some of the most troubling ethical issues that arise in legal representation. As a service to members, the Tax Practice Management Subcommittee will expand on the discussion below by sponsoring a member-benefit teleconference on DECEMBER 11, 2002, entitled, "What Engagement Letter?" The panel, which will include tax lawyers from solo practices and small and mid-sized firms, will discuss numerous practical and ethical issues involved in a tax attorney's undertaking the representation of new clients. In many jurisdictions, use of engagement letters is mandatory. Even in those jurisdictions which do not strictly require engagement letters, malpractice insurance coverage may be significantly less expensive if lawyers routinely use engagement letters. The panelists will discuss the pros and cons of various styles of engagement letters used in diverse areas of tax practice, covering issues including those discussed in this article, and will review a number of sample letters. Those sample letters will be available at: www.abanet.org/cle/programs/t02tll1.html. For details on registering and obtaining CLE ethics credit, please see the box immediately following this Report.

*by Aen Walker Webster,
Washington, DC, and
Paul E. Van Horn, New York, NY*

The engagement letter is rarely the primary focus for a tax lawyer at the outset of a representation. Many of us use forms we have developed over the years for various types of client matters and the engagement letters we send to new or continuing clients are based almost entirely on those forms. The rules of most courts permit the use of a standardized letter (sometimes even a memorandum or pamphlet) to provide clients with required information. In general, a letter tailored to the particular client or situation is not needed. See, for example, Comments to Rule 1.5 of the District of Columbia Rules of Professional Conduct. Even if based on standardized forms, engagement letters deserve close attention as they not only give the client needed information, but can also establish the parameters of a client matter for a number of purposes.

Ethical rules in most jurisdictions require a writing that sets forth the agreement between the lawyer and client as to the scope and terms of a representation. By setting forth the precise scope of the representation, we may focus the client on the limits of the services to be provided. A disconnect between the services the lawyer contemplates and the open-ended vision a client may have all too often leads to disputes, and a detailed engagement letter can ensure that both the lawyer and the client share an understanding of the scope of the representation.

FEES AND RETAINERS

Information commonly addressed in engagement letters includes the basis of charges for the lawyer's services and costs. The letter should address whether services will be provided for a fixed fee, on a contingency basis or on the basis of hourly charges, and whether any blended rates will apply. If a retainer is involved, the letter should specify

whether it is to be treated as a nonrefundable fee to secure the lawyer's services or an advance payment that will be consumed as services are performed. If the latter, the letter also should make clear the means by which the client will be informed of the services performed and the status of the prepaid amount. An engagement letter also should provide that in the event the scope of the representation changes, the lawyer reserves the right to revisit the agreed upon fees.

The engagement letter also should set forth the lawyer's billing procedures, including whether payment may be by credit card and whether interest will be charged on late payments. How the lawyer will bill for travel time and related costs also should be disclosed in the engagement letter. In addition, the letter should set forth the nature of costs passed through to clients and any adjustment to those costs to reflect an allocable portion of firm overhead. ABA Formal Opinion 379, issued in 1993, discusses this issue in more detail. In the years since that opinion was issued, clients have become increasingly prone to question these charges and many larger clients may seek to negotiate them up front.

In some jurisdictions the engagement letter may specify arbitration of disputes about bills and other matters. If so, it may be necessary to specify that the client should seek independent legal advice prior to agreeing to this feature. The lawyer may also reserve the right to receive reasonable fees and costs if legal action is needed to collect the agreed-upon fee. From a client-relations point of view, however, too many references to independent counsel and potential disputes may obviate the need for any engagement letter at all—the client will be scared away.

CONFLICTS OF INTEREST

Many ethical issues may be addressed in engagement letters. For those who remember Homer's *Odyssey*, perhaps the Scylla and Charybdis in the context of engagement letters are conflicts of interest and confidentiality. Although negotiating the obstacles can be daunting, ignoring the issue can lead to unwanted and unnecessary disputes later on.

Rule 1.6 of the ABA Model Rules (and corresponding provisions of the ethical rules applicable in each jurisdiction) addresses conflicts of interest. These may arise between or among the lawyer, an existing client, a potential new client, a former client, or even in the representation of one client who is acting in dual capacities. In order to establish clearly to whom the lawyer's duty runs, it is important to establish the identity of the client. For example, does the lawyer represent the business, or its founder? What about an officer or employee of the business? If the initial contact is with a wife, does the lawyer represent her, or the couple? If the representation is joint, it is important to establish from the start what that implies as to the lawyer's ability to provide separate counsel to, or receive separate information from, either party. If the lawyer is retained to administer an estate, is the estate itself the client? More commonly it is the fiduciary of the estate, whether referred to as the Executor, Personal Representative or Administrator. Accordingly, if the fiduciary has invited one or more beneficiaries to an initial meeting, it is important to establish that the lawyer does not also represent the beneficiaries, to the extent their interests diverge from those of the estate fiduciary.

In situations similar to those described above, it is important to identify potential as well as actual conflicts. The client may waive, if the conflict is disclosed fully and the waiver is knowing. In some instances, it may be prudent to suggest consultation with independent counsel as to the waiver.



When a conflict can be anticipated, the engagement letter may explain that if a conflict arises, the lawyer reserves the right to withdraw and need not share the reason. In joint representations and other situations where conflict may be predictable, it is often prudent to state up front that in the event of the lawyer's withdrawal for any reason the client could incur extra costs in securing new representation. In that way, the client may make a decision weighing all facts, including the cost of potential duplication of effort by new counsel.

CONFIDENTIALITY

The lawyer's duty to maintain client confidences, set forth in Rule

1.7 of the ABA Model Rules, is implicated in any joint representation or whenever a third party is involved in any aspect of a client matter. For instance, in a dual representation, lawyers may find themselves squarely confronted with a choice between violating the duty to maintain a client confidence and violating the rule against conflicts of interest. (As promised above, the lawyer now must navigate between Scylla and Charybdis.) A well-drafted engagement letter which is in place before the incident arises can provide a simple escape hatch from a situation that otherwise could be extremely difficult. In tax representations, the client may bring an accountant, actuary, insurance

agent, financial advisor or other third party to one or more meetings and may expect the lawyer to provide information and/or work product to the third party. Additionally, the duties of tax lawyers to provide certain information to the Internal Revenue Service pursuant to Circular 230 or Tax Court rules may be contrary to the ethical duty to preserve client confidentiality. The engagement letter should set forth any known exceptions to confidentiality in a given matter and should explain the possible need to share information with the Service.

RETURNING RECORDS

An additional issue to address is the retention or return of client records at the conclusion of the representation. Rules vary considerably from state to state as to the lawyer's duty to retain client records and, with the exception of executed original documents such as partnership agreements, wills and contracts (which, in any event, it may be prudent not to hold in safekeeping for clients, but that is the subject of another article), the lawyer may have the right to destroy files and other records after a certain period. Whatever the rules are

in a particular state should be explained, so that the client knows what to expect.

Even the best engagement letter cannot forestall all conflicts or solve every dilemma that may arise in the area of maintaining client confidences, but it should keep disputes regarding the issues covered to a minimum and can be a most important path to safety in the event of a conflict. Of course, the lawyer should ensure that the client evidences his or her agreement to the terms of the engagement letter by signing it. Only with the client's assent will the letter create a contract. ■



Now that you've read the previous article, get no-cost CLE credit via the *ABA Tax Link Live* teleconference on Wednesday, December 11, 2002, at 2:00 p.m. (ET).

COST FOR NONMEMBERS

This teleconference is provided at no cost to Tax Section members as a benefit of membership. The fee for Non-Section Members is \$125, and for Non-ABA Members is \$150.

IT'S EASY TO REGISTER

Call the ABA Service Center at 1-800-285-2221 from 8:30 a.m. to 6:30 p.m. (ET) weekdays beginning November 1, 2002. Or register online at www.abanet.org/cle/programs/t02tll1.html. You'll need your ABA member ID number, and if you want to earn MCLE credit, your state law license number. After registering, you will be faxed a toll-free telephone number to call for the program, a personal identification number (PIN) to access it, a certificate of attendance, and an evaluation form to send back after the program.

EASY TO PARTICIPATE

Read the preceding article, register, then participate in the live 60-minute teleconference on December 11, 2002 from any touch-tone phone in the 50 states or D.C.

AND EASY TO GET CLE CREDIT

Earn credit at your home or office in states that approve the telephone format: AL, AZ, AR, CA, FL, GA*, ID, IA, KY, MN, MS, MO, MT, NV, NH, NM, NC, ND, NY, OK, OR, RI, TN, TX, UT, VT, VA, WA, WV, WI, WY.

ABA Tax Link Live Teleconference WHAT ENGAGEMENT LETTER?

Panelists:

Bruce Ross, Holland & Knight, LLP, Los Angeles, California
 Katrina Kamantauskas-Holder, The Holder Group, Baltimore, Maryland
 David Dickieson, Silverstein and Mullens, a Division of Buchanan Ingersoll, PC, Washington, DC
 Norma Sharara, Silverstein and Mullens, a Division of Buchanan Ingersoll, PC, Washington, DC—(Moderator)

Wednesday, December 11, 2002, 2:00–3:00 p.m. Eastern Time
REGISTER TODAY. CALL 1-800-285-2221.

*In-house study only; call the ABA or your local bar association for details.